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No. 10-857

Supreme Court, U.S.
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In The

Supreme Court of the United States

COUNTY OF ORANGE [CALIFORNIA], HELEN DWOJAK, and MARCIE VREEKEN,

Petitioners,

v.

DEANNA FOGARTY-HARDWICK,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A magistrate in a state juvenile dependency proceeding issued an order removing two children from their mother's custody. The mother later agreed to no custody in exchange for dismissal of the dependency proceeding and she lost her bid to reacquire custody in a later family law proceeding. The mother sued a county and two of its social workers for "loss of familial association" under 42 U.S.C. § 1983. A jury found the social workers committed perjury and withheld exculpatory evidence in the dependency proceeding, awarding nearly $5 million in damages, mostly against the county.

1. Despite no history of similar violations, the county was found liable under § 1983 for failing to train its social workers. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris*, 489 U.S. 378, 389-391 (1989). A pattern of violations is usually necessary to show culpability and causation. This Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. *See Canton*, 489 U.S. at 390 n.10. The issue is currently before this Court in *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010). Does imposing failure-to-train liability on a social services agency for a single constitutional violation contravene the rigorous culpability and causation standards of *Canton*?

QUESTIONS PRESENTED – Continued

2. The mother "established" liability against the county under *Monell v. Department of Social Services*, 438 U.S. 658 (1978), through responses to requests for admissions generally stating that the social workers' unspecified conduct "complied with" the county's custom or practice. Do such responses to requests for admissions constitute sufficient evidence of an official policy that was the moving force behind a constitutional injury, as required by *Monell*?

3. In *Heck v. Humphrey,* 512 U.S. 477 (1994), this Court held that reversal or vacation of a criminal judgment is necessary in order to demonstrate that the then-defendant (and now section 1983 plaintiff) was directly harmed by the underlying misconduct. In order to satisfy the rigorous culpability and causation standards of *City of Canton*, should the rule in *Heck* also be applied to dependency or family law proceedings?

4. The county raised the issue of the absolute immunity of its social workers in challenging the sufficiency of the complaint, in its summary judgment motion, and in post-trial motions. However, the county did not plead absolute immunity as an affirmative defense in its answer. Under these circumstances, does a governmental entity waive the defense of absolute immunity?

RULE 29.6 STATEMENT

The County of Orange is a municipal corporation duly organized under the laws of the State of California. Both Helen Dwojak and Marcie Vreeken are individuals.

LIST OF PARTIES

Plaintiff and Respondent: Deanna Fogarty-Hardwick

Defendants and Petitioners: The County of Orange, Helen Dwojak, and Marcie Vreeken

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RULES AND REGULATIONS

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The County of Orange (California), Helen Dwojak, and Marcie Vreeken respectfully ask this Court to issue a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three.

OPINIONS BELOW

In *Fogarty-Hardwick v. County of Orange*, the California Court of Appeal, Fourth Appellate District Division Three, affirmed a judgment against the County of Orange (in the amount of $4,521,570), Helen Dwojak (in the amount of $278,100) and Marcie Vreeken (in the amount of $119,186). The opinion is reprinted at App. 1. The Court of Appeal denied a petition for rehearing. App. 92. The California Supreme Court denied review on September 29, 2010. App. 93.

JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1257. This petition has been filed within 90 days after the California Supreme Court denied review.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

California Welfare and Institutions Code Section 300 provides, in pertinent part:

> Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:
>
> (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian

which indicate the child is at risk of serious physical harm. . . .

(b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. . . .

(c) The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. . . .

(d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the [California] Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian

has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.

INTRODUCTION

In *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010), this Court will decide whether imposing "failure-to-train" liability on a governmental entity for a single constitutional violation contravenes the culpability and causation standards of *City of Canton v. Harris*, 489 U.S. 378 (1989), and *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This case presents the same issue but involves a social services agency rather than a prosecutor's office. The jury here awarded nearly $5 million in damages for "loss of familial association" based on allegations that two social workers lied and suppressed evidence in a California juvenile dependency proceeding, causing a state magistrate to order removal of plaintiff's two children from her custody. Aside from responses to generic requests for admissions (a separate issue discussed below), the only evidence of a governmental "policy" stemmed from the conduct occurring in this case. As to this issue, petitioners request that this Court grant certiorari, vacate the judgment, and retransfer this matter to the California Court of Appeal for reconsideration in light of the principles to be set forth in *Connick*.

This case presents other compelling issues. The California Court of Appeal found liability against the

County of Orange based on responses to generic requests for admissions, which asked if the social workers' actions complied with County policy (without specifying the conduct). Although there is a split of authority, the majority of federal courts have held that such "admissions" do not establish a governmental policy sufficient to find liability under the *Monell* doctrine. This Court should resolve the divergence in the case law.

Petitioners also argued below that Deanna Fogarty-Hardwick's failure to retain custody in either juvenile court or family court prevented her from obtaining recovery for "loss of familial association" in civil court. The California Court of Appeal rejected this argument, holding that *Heck v. Humphrey,* 512 U.S. 477 (1994) only applied where the underlying proceedings were criminal in nature. This Court should decide whether extending *Heck* to juvenile or family court proceedings furthers the rigorous culpability and causation standards of *City of Canton* and *Monell.*

Finally, the California Court of Appeal held that petitioners waived their defense of absolute immunity by failing to plead it as an affirmative defense in their answer. However, lower federal courts have consistently held that there is no waiver if the defense is raised in other ways, such as in a challenge to the pleadings or in a summary judgment motion. Petitioners raised the defense in that manner here. This Court should address whether state courts can find waiver of federal immunities in civil rights cases.

All of these issues demonstrate the haphazard and inconsistent application of federal law in state tribunals. Certiorari is necessary in order to address these issues.

STATEMENT OF THE CASE

Deanna Fogarty-Hardwick ("Deanna") sued the County of Orange and a number of its social workers, including defendants Vreeken and Dwojak, alleging that defendants violated her rights to familial association in connection with the institution and handling of dependency proceedings over her daughters under California's juvenile dependency law.[1]

Deanna alleged that Dwojak and Vreeken, along with another social worker (Elaine Wilkins), lied, fabricated evidence, and withheld exculpatory evidence from the dependency court, allegedly causing her to lose custody of her daughters. At trial the jury found liability against Dwojak and Vreeken for their conduct and found that the County was also liable under *Monell v. Department of Social Services* (1978) 436 U.S. 658. App. 56-57, 60-67.[2]

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[1] Although the California Court of Appeal referred to plaintiff as "Fogarty-Hardwick," petitioners will use her first name because of the multiple references to her former spouse, Cary. No disrespect is intended.

[2] The jury found no liability against social worker Wilkins. App. 58-59.

Deanna alleges that she was denied custody of her children as a result of judicial deception perpetrated by the defendants. However, prior to filing her lawsuit, Deanna never challenged any of the dependency or custody orders issued in the dependency or family law proceedings, including the family court order awarding custody to her former spouse. The history of those actions, as pertinent to her claims, is as follows:

A. The Initial Dissolution Proceedings in Family Court.

Deanna and Cary Hardwick filed for divorce in 1995 and obtained a status-only judgment of dissolution in early 1998. The couple has two daughters, K. and P. K. is autistic. Prior to November 1999, Deanna had primary custody of the children, with Cary having custody three weekends a month. Shortly after Cary remarried, Dr. Marjorie Mitchell became the children's therapist, primarily to assist them in adjusting to their father's recent marriage. App. 3-4.

In late 1999, Cary moved for full custody of the children, claiming that he was having difficulty coparenting with Deanna. At about the same time, Deanna brought K. to see Dr. Mitchell to report that Cary had sexually abused K. Although Dr. Mitchell was suspicious about the timing of the allegation, she was under a mandatory duty to report the allegations, and she did so. App. 3-4.

B. The Dependency Proceedings in Juvenile Court.

1. The County Initiates Dependency Proceedings.

As a result of Dr. Mitchell's report, the County's Social Services Agency (SSA) filed a juvenile dependency petition pursuant to California Welfare and Institutions Code Section 300, subdivision (b) (risk of serious physical harm or illness to the child as a result of a failure to supervise or protect) and subdivision (d) (child has been a victim of, or is at risk of, sexual abuse). Another social worker (Rachel Davis, not a named defendant) was initially assigned to the case. She conducted an investigation and prepared reports as well as participated in filing the initial and first amended dependency petition. App. 4. Deanna never claimed any inaccuracies in Davis' reports, and further testified that she trusted Davis and "there was no reason not to. . . . [S]he was wonderful." App. 95.

At the initial detention hearing, the juvenile court ordered the children to remain in Deanna's custody with Cary having monitored visitation. App. 4.

2. Cary Experiences Problems in Receiving Ordered Visitation and Phone Calls.

Once SSA became involved, Cary was limited to monitored visits each week. There were problems with Cary's visitation (i.e., the children missed visitations, and Cary did not get his allotted phone calls),

and disputes arose as to who was responsible for those problems. Among other things, the daughters expressed unwillingness to visit with their father, and K. made allegations against one of the monitors – Hector Delgadillo – which caused him to be replaced for a time. App. 4.

3. SSA Files an Amended Petition, Specifically Naming Deanna.

In February 2000, SSA filed a first amended dependency petition, adding a count under California Welfare and Institutions Code Section 300, subdivision (c) (child suffering, or at serious risk of suffering, serious emotional distress). This new count named Deanna and alleged (among other things) that the custody battle had placed K. in the middle of the parents' deteriorating relationship and caused her emotional distress, and Deanna exposed K. to her hypervigilant attitude toward Cary and his new wife, which caused K. to suffer emotional distress. App. 4-5.

4. The February 13, 2000 Attempted Visit Between Cary and His Daughters.

Cary attempted to visit with his daughters using Delgadillo as the private monitor on February 13. Deanna drove the children to the site, but both girls refused to visit, and Deanna drove them away. App. 5.

5. The February 15 SSA Visitation and the Dependency Court Hearing Following It.

Two days later (on February 15), the girls had another monitored visit with Cary. This visit with Cary went smoothly. Once the visit concluded, K. and P. became visibly upset. The jury found (as Deanna alleged) that Vreeken had spoken with both girls, telling them they had to visit with their father, and if they did not, the judge was going to put them in a home. Vreeken repeated these statements to Deanna. App. 5.

The dependency court held a hearing two days later, and reviewed visitation issues in light of past problems and warnings he had issued. The court referenced off-the-record discussions it had with counsel and with Vreeken. Wilkins and Vreeken told the dependency court that Deanna had told the girls their father was trying to take them away from her. The social workers also stated that Deanna had been responsible for turning K. against Delgadillo, the visitation monitor. App. 6.

Deanna, through counsel, denied these things, but the dependency court concluded that Deanna was "using these children." App. 6. The court's statements are quoted in their entirety:

> I have been doing this since I think about 1990. That's how long I have been on the bench. I don't think I have ever had to order Social Services to remove a child from a home before. *This is remarkable because we*

were just here. I warned the parents what would happen.

And it's interesting because whether or not the mother knew of the court's decision regarding whether or not Mr. Delgadeo [*sic*] was an appropriate monitor, it's interesting to note to the court that once the mother had made a decision as to whether she liked Mr. Delgadeo [*sic*] or not, her children decided they didn't like [him] and I note that the things the children say when they are vilifying the folks that mother doesn't like are very conclusionary and there is no real detail as to what, exactly, it is. That's the problem.

In this particular case when they are talking about Mr. Delgadeo [*sic*], [K.] says that [he] threatened her, and then when he is asked what was said, he said, "Well, come on. I will go with you." Now that tells me that you have got a child who has been told that somebody has threatened him without knowing what threatening means.

Without regard to whether or not the conduct by the father had taken place or not, this is just not acceptable. *You are using these children, ma'am. There is no question in my mind, based on what I have got right now before me, that that's what's going on.*

We are going to have a trial on the 28th. And it may well be that you are right and you didn't say these things, but from the evidence I have before me right now, it looks like you are. And just as at the detention

> hearing, I have got to be looking out for the welfare of these children. I have got to do that today, too, based on what I have before me right now. I think I have no other choice but to do that.
>
> So I am going to find that it's of immediate and urgent necessity for the protection of these children that they be removed from your home. And I find that to leave these children in your home at this time would create a substantial risk of emotional and psychological detriment to these children. I am ordering Social Services Agency to remove these children from the home.

(Italics added.) App. 124-126.

The dependency court ordered that the children be placed at a children's home. The children were later removed to foster care, where they remained until May 2000. App. 7.

6. Deanna States That Vreeken Threatened Her.

After a March 1, 2000 trial setting conference, Deanna and Vreeken engaged in a "highly charged" conversation concerning the claims made by the social workers about Deanna's conduct. According to Deanna, Vreeken stated that if Deanna did not "submit" to her will, she would "never see [her] kids again." And while both girls, and especially K., exhibited significant emotional distress in their placement, which was reported to SSA by their therapist, that

information (according to the opinion) was not conveyed to the court by the social workers. App. 7-8.[3]

7. When Deanna and Cary Discuss Settlement During the Contested Jurisdictional Hearing, the Dependency Court Orders a "730 Evaluation," Prompting a Report From Dr. Rogers That is Critical of Deanna.

The contested jurisdictional hearing began in March. By May, nearing the end of testimony, the parties discussed a means of resolving the dependency proceedings through a "301 Agreement," under which Cary and Deanna would agree to counseling without court supervision. The court ordered an evaluation from Dr. Rogers to assist in understanding whether Cary had molested K. and whether she and P. were suffering emotional damage due to their parents' conduct. App. 8.

In her report, Dr. Rogers discussed her belief that K.'s accusation of sexual abuse had been "too coincidental" to be credible, and did not appear "spontaneous." Dr. Rogers did not conclude that Deanna had made any conscious effort to encourage K. to make a false claim of sexual abuse, but believed that due to

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[3] A court report addendum drafted by Vreeken and filed in juvenile court on April 4, 2000, established that the information was indeed conveyed. App. 134. The California Court of Appeal ignored this evidence.

K.'s autism, she was less able to differentiate between her own experiences and what she had been told. Thus, Deanna's own fears and preoccupation with the issue had unduly influenced K.'s perceptions. Dr. Rogers also found that both parents had inflicted some degree of emotional abuse on the children, by virtue of their difficult relationship, but that Cary was more able to differentiate between his own needs and those of his children, and was thus better at shielding the children from his emotional issues. Dr. Rogers concluded that while Deanna's visits with the children should remain monitored, Cary should be allowed unrestricted contact. App. 8-9.[4]

8. After Receiving Dr. Rogers' Report, Deanna Stipulates to Cary's Custody and the Petition is Dismissed.

The parties agreed to resolve the dependency proceedings once they had received Dr. Rogers' report. Deanna stipulated to an agreement under which the juvenile court dismissed the amended petition and authorized informal supervision pursuant to the parties' agreement. The children would be released into the temporary custody of Cary and Deanna would be restricted to monitored visitation, which

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[4] The paragraph summarizing Dr. Rogers' report is set forth almost verbatim from the California Court of Appeal's opinion. Unfortunately, the County was prohibited from referring to that report at trial, and thus, the jury did not have the benefit of these facts.

could be increased and liberalized as she complied with the requirements of the plan. The children were immediately taken out of foster care and placed with Cary and the matter was transferred back to family court. Deana testified that she believed she had no choice other than to agree in order get her children out of foster care. App. 9.

C. The Custody Proceedings in Family Court.

In December 2001, and after protracted proceedings, the family court granted legal and physical custody to Cary and set a visitation schedule. App. 10. In a detailed order, the family court addressed the sexual abuse accusations against Cary. The court found that many of Deanna's declarations contained inconsistent information concerning her work history, income and expenses; the court further found it did not believe her statements that she could not afford a monitor to visit with her children because, during the same period, she claims she paid over $100,000 to attorneys. App. 85. The court also found that K.'s story (related to Dr. Mitchell and summarized above) verified Cary's contention that Deanna programmed the child to accuse her father of sexual abuse. However, since the court believed Deanna thought the accusation to be true (whether or not she coached it), it declined to award sanctions in the form of attorneys' fees. App. 10, 86.

In its custody order, the court cautioned Deanna as follows: "This court is trying to consider the past,

be aware of the present, and make orders for the future of these children that will allow them to have a relationship with both parents. *If the mother is unable or refuses to forget the past this order will not succeed and litigation will continue causing the children to suffer greatly.*" (Italics added.) App. 82-83.

Deanna regained shared custody in 2006. App. 10.

D. The Present Lawsuit in Superior Court.

1. The Claims Contained in the Operative Complaint and the Court of Appeal's Reversal of the Demurrer Ruling.

Deanna filed the present lawsuit in February 2001, alleging (among other things) a cause of action under 42 U.S.C. Section 1983 for violations of her constitutional right to familial association. According to Deanna, the County's social workers had relied upon "intentional[ly] false statements," fabricated evidence, and "perjury" as part of a successful effort to convince the juvenile court to remove her daughters from her custody and place them in foster care. She also asserted the County had a policy of "deliberate indifference" to the rights of parents in her situation and, as a result of that policy, the County failed to supervise, control or direct the conduct of its social workers. App. 10-11.

The County challenged Deanna's complaint, relying (among other things) on collateral estoppel and absolute immunity. After the trial court dismissed the

complaint without leave to amend, the California Court of Appeal determined the ruling was correct only as to the state law tort claims, concluding the Section 1983 claim was properly alleged, and reversed the judgment with directions to overrule the demurrer with respect to that claim. The Court of Appeal left it to the trial court, on remand, "to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion." App. 11-12.

2. Post-Remand Proceedings Before Trial.

In its answer to the second amended complaint, the County pleaded the affirmative defense of qualified immunity, but did not plead the defense of absolute immunity.

The parties then conducted discovery. Deanna sent requests for admissions to all three defendants, including the following: (1) "Admit that you were at all times carrying out the policies of defendant Orange County Social Services Agency in your handling of the matter of *Hardwick* . . . "; and (2) "Admit that you were at all times carrying out the customs, meaning the permanent, widespread, or well settled practices of defendant Orange County Social Services Agency in your handling of the *Hardwick* matter." Defendants admitted these requests. App. 97-99.

Deanna took the deposition of the person most knowledgeable on the County's policies and procedures (Susan Holl), and Holl's deposition was read at

trial. She testified that social workers are not to provide perjured testimony and that they may be held personally liable if they fabricate evidence. Holl also testified that she had no knowledge of a social worker ever being disciplined for failing to offer exculpatory evidence. App. 103-107.

The County moved for summary judgment, arguing that (1) all of the wrongful conduct alleged against the social workers qualified as "quasi-prosecutorial," and was thus protected by absolute immunity; and (2) the alleged conduct fell within the absolute testimonial privilege. Deanna opposed the motion, arguing the defense of absolute immunity had been waived by the County's failure to plead it, and the court denied the motion in October 2006. The trial court also denied the County's later motion to amend its answer. App. 12-13.

3. The Trial and Post-Trial Proceedings.

The jury found that both Vreeken and Dwojak "intentionally violate[d] the plaintiff's right to familial association or right to privacy"; that they did so "while acting or purporting to act in the performance of their official duties"; and that their conduct was a substantial factor in causing Deanna's harm. The jury found that Vreeken caused $117,386 in damages and Dwojak caused $273,900 in damages. App. 13.

The jury concluded that Vreeken and Dwojak's conduct occurred "as a result of the official policy or custom of the County of Orange," and in connection

with that verdict, the jury concluded Deanna's damages were $2,260,785. The jury also found that the County was "deliberately indifferent to the need to train and/or supervise its employees adequately," and that failure was both the cause of Deanna's loss of familial association and a substantial factor in causing harm to her. In connection with that special verdict, the jury concluded that Deanna's damages totaled $2,260,785. App. 14.

The jury returned a special verdict concluding that "regardless of the award of damages in [the other verdict forms] . . . , the total damages suffered by" Deanna were $411,456 in past economic losses; $36,400 in future economic losses; $2,810,000 in past non-economic losses; and $1,655,010 in future non-economic losses. These "total damage" numbers add up to $4,912,866 – the same total reached by adding up the separate damage amounts assessed against each defendant. Finally, the jury found that both Vreeken and Dwojak acted with "malice, oppression or fraud." The jury assessed punitive damages against Vreeken in the amount of $1,800, and against Dwojak in the amount of $4,200. (*Id.* at p. 11.) The trial court denied the County's motion for judgment notwithstanding the verdict and for a new trial. App. 14-15.

4. The Court of Appeal Affirms the Monetary Judgment in All Material Respects, Reverses the Trial Court's Imposition of a Permanent Injunction, and Denies the County's Petition for Rehearing.

Following standard and supplemental briefing, the California Court of Appeal affirmed the monetary judgment in its entirety. The holdings included:

- The County waived its argument concerning the lack of substantial evidence to support a County policy but, in any event, the responses to the requests for admissions constituted substantial evidence. App. 36.

- The rule based on *Heck v. Humphrey*, 512 U.S. 477 (1994), requiring a reversal or vacation of a criminal judgment to demonstrate the plaintiff was directly harmed by the underlying misconduct could not be applied to dependency or family law proceedings. App. 27-28.

- The County waived the defense of absolute immunity by failing to plead it in its answer. App. 30-32.

The Court of Appeal reversed the grant of a permanent injunction, holding that the trial court had no authority to issue an injunction prohibiting the County from including allegations in a juvenile dependency petition against any parent or guardian without reasonable and articulable evidence that the child has been abused, neglected or abandoned *by the*

accused parent or guardian, or is in immediate danger of abuse, neglect or abandonment *by that parent* because the injunction is inconsistent with the statute governing dependency jurisdiction. The Court of Appeal also found that the trial court was also without authority to issue an order prohibiting a parent or guardian from signing an "Agency Temporary Agreement" for the release of confidential information absent reasonable suspicion for the same reasons. The injunction also improperly purported to control the conduct of social services in future cases before the dependency court. App. 48.

The Court of Appeal denied the County's petition for rehearing (App. 92), which was largely based on the requests for admission issue.

The California Supreme Court denied the County's petition for review. App. 93. The grounds for the petition included whether responses for requests for admission alone may establish a policy and thus *Monell* liability and whether a governmental entity waives absolute immunity by failing to include the defense in its answer.

REASONS WHY THE PETITION SHOULD BE GRANTED

I

This Court Should Grant, Vacate, and Retransfer Pursuant to the Principles to be Addressed in the *Connick* Decision, Because *Monell* Liability Here Was Based on the Conduct of Social Workers in a Single Dependency Proceeding.

A municipality is not liable under Section 1983 simply because it employs a tortfeasor. Instead, a plaintiff must show that the municipality has an unconstitutional policy or custom that directly causes a constitutional injury. *Monell*, 436 U.S. at 690-694 (the legislative history of Section 1983 "compels the conclusion that Congress did not intend municipalities to be held liable *unless* action pursuant to official municipal policy of some nature caused a constitutional tort"); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997).

In enacting Section 1983, Congress chose its language carefully to ensure that liability could not be imposed vicariously "solely on the basis of the existence of an employer-employee relationship with a tortfeasor" and in the absence of proof that it was policy, *and not* merely employee misfeasance, that was the cause of a plaintiff's injury. *Monell*, 436 U.S. at 692.

Consistent with these principals, "a single instance of unconstitutional activity is insufficient to

establish a policy under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved." *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-824 (1985); *Ramirez v. County of Los Angeles,* 397 F.Supp.2d 1208, 1228 (C.D. Cal. 2005).

Here, Deanna did not show the existence of a written policy to prove fault and causation. *See Bryan County,* 520 U.S. at 403-407; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-484 (1986). Nor did she establish that an official policymaker affirmatively ordered unconstitutional action. *Ibid.*; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, she was required to show either (1) a widespread practice that is so permanent and well-settled as to constitute a custom or usage that has the force of law, and that such practice was the cause of injury (*Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989), or (2) an official with final policymaking authority ratified a subordinate's decision and the basis for it. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

If a party proceeds on a theory that municipal inaction – i.e., a failure to train – was the cause of a constitutional injury, he or she must show that the failure to train was the product of a "deliberate" or "conscious" choice by a municipality or by its policymakers. *City of Canton v. Harris,* 489 U.S. 378, 389 (1989). Hence, a plaintiff must show that the

policymaker made a deliberate choice to approve a subordinate's wrongful conduct, in full awareness of the nature and extent of that conduct. *City of Canton*, 489 U.S. at 388-389 & n.7. Even gross negligence in failing to discover or head off that conduct is insufficient. *Id.* at 390-391.

In the present case, Deanna did not offer evidence that the County had prior notice that conduct like that she alleged here had occurred previously in any other dependency case.[5] She offered no evidence that similar charges had been made (let alone sustained) against Dwojak or Vreeken. Thus, to the extent the California Court of Appeal's affirmance *sub silentio* relies on a failure to train, it completely negates any distinction between municipal and vicarious liability.

At the time of the social workers' alleged actions, no law required counties to train their social workers to disclose exculpatory evidence. No case had held that such a duty to disclose was even applicable in dependency proceedings. *See Clarke v. Upton*, 2009 U.S. Dist. Lexis 44045, *53-54 (E.D. Cal. 2009) (noting lack of authority). This suggests that failure-to-train liability for a failure to disclose exculpatory

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[5] Deanna did show a pattern of including certain allegations in dependency petitions, which persuaded the trial court to grant injunctive relief. However, the Court of Appeal reversed the injunction because the trial court lacked authority to issue it. In any event, this particular "pattern" of conduct did not harm Deanna and was not the basis for the imposition of damages.

evidence could not be actionable against a county, at least for a failure prior to 2009. Hence, a failure to train on this issue could not give rise to "single-incident" liability in a dependency case.

As to lying or fabricating evidence, lay persons daily confront the obligation to tell the truth. They sign forms (including tax returns, residential home disclosure forms, declarations and affidavits) under penalty of perjury. Social workers submit each of their reports signed under penalty of perjury. What training could or would assist in ensuring that social workers tell or write the truth? There is nothing about the circumstances of this case that would bring it within the narrow exception for single instance liability identified in *City of Canton*.

Liability based on failure to train requires a pattern of employee wrongdoing. *Bryan County*, 520 U.S. at 409. A municipality's negligence in training or supervision is not enough to show the requisite pattern and deliberate indifference, nor will it show that the inadequate training or supervision caused any injury.

In *Bryan County*, this Court suggested that there might be a "narrow range" of circumstances in which failure to adequately train or supervise might be triggered by a single violation. *Bryan County*, 520 U.S. at 409. This suggestion, in turn, arose from language in *City of Canton* providing an example involving the use of deadly force (from which there can be no recovery). In that example, when a municipality arms

its officers with firearms, and fails to train them on the constitutional limits of when to use deadly force, the risk of fatalities, and grievous injuries in connection with use of firearms can be deemed so obvious, that the failure to train them can be considered deliberate indifference to constitutional rights. *City of Canton*, 489 U.S. at 390 n.10.

Even so, this Court still mandated that the municipality have some advance notice before municipal liability could be imposed in order to avoid weakening or abating the stringent fault and causation requirements necessary to find municipal liability under *Monell* in single instance failure-to-warn cases. Otherwise, as Justice O'Connor noted in both *City of Canton* and *Bryan County*, the failure-to-train theory would engulf *Monell* and impose liability without municipal fault or causation. *City of Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part); *Bryan County*, 520 U.S. at 409.

This issue is presently before the Court in *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010). As to this issue, petitioners request that the Court grant certiorari, vacate the judgment, and retransfer the matter to the California Court of Appeal for further consideration in light of the principles to be set forth in the *Connick* opinion.

II

This Court Should Address Whether Requests for Admissions of the Type at Issue Here May Be Used to Establish *Monell* Liability.

Other than evidence derived solely from this case, the only other showing of a governmental policy was derived from petitioners' responses to requests for admissions.[6] These responses admitted that the social workers in general carried out the policies, customs or practices of the County in their handling of the dependency proceeding. App. 97-99. The requests did not specifically identify the conduct (i.e., perjury and withholding evidence); rather, Deanna purportedly made that showing at trial and then claimed petitioners "admitted" that all of their conduct was pursuant to County policy.

The County did not have any formal policy condoning such improper acts; rather, social workers were to report information accurately and subject to the penalties of perjury. App. 104. The County knew of no other cases in which a social worker had been found to have committed acts such as those charged

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[6] Deanna tried, and failed, to establish a County policy through the testimony of Larry Leaman, director of the County's Department of Child Support Services. App. 100-103. No evidence was presented that Leaman implemented an unconstitutional policy, or ratified unconstitutional actions, and the California Court of Appeal found none. It was presumably for this reason that Deanna dismissed Leaman as a defendant before trial.

here. App. 106. Apart from the generic responses to the requests for admissions, the evidence did not establish the existence of an affirmative policy or a widespread pattern of improper conduct that rose to the level of a custom or usage.

Pursuant to the teachings of *Monell* and its progeny, simple discovery responses that an employee was acting within custom or policy without evidence that the response was made with knowledge that the employees' actions were in fact unconstitutional *should constitute* nothing more than an irrelevant opinion. Two cases – *Hudson v. City of N. Las Vegas*, 2007 U.S. Dist. Lexis 2377 (D. Nev. 2007) and *Cooper v. City of Fargo,* 905 F. Supp. 703 (D. N.D. 1995) – have so found in light of this Court's precedents. One other court – *Stachan v. City of Federal Heights,* 837 F.Supp. 1086, 1092 (D. Colo. 1993) – held to the contrary, without considering the foregoing precedents and mechanically applying Fed.R.Civ.Proc. Rule 36(a).

In *Hudson*, the city admitted in a police misconduct case "that the actions of [defendant officers] . . . with respect to [their] encounter with plaintiff John Hudson were completely and entirely within the policies, practices, procedures and custom of the City of North Las Vegas." *Hudson,* 2007 U.S. Dist. Lexis 2377 at *22-23. The district court held this "admission" did not establish a policy sufficient under *Monell*:

> Although the City admitted the officer's conduct was within its policies and practices,

> such an admission simply shows that the city sanctioned its officers' conduct ***because it believes the officers acted appropriately and constitutionally***, i.e., within its policies and practices. ***Evidence demonstrating a municipality's opinion regarding the constitutionality of its employees' conduct is irrelevant with respect to whether a municipality promulgated a policy causing its employees to act unconstitutionally***.

Id. at *23 (emphasis added).

Cooper v. City of Fargo, supra, 905 F. Supp. 703, reached the same conclusion. In *Cooper*, plaintiffs alleged they were illegally arrested for picketing in a residential neighborhood. The City admitted that its arresting officer (Niemann) "acted pursuant to the City's official policies, customs, practices and procedures" and "pursuant to his training and instruction as a City of Fargo police officer" when he arrested plaintiffs. *Id.* at 708. Plaintiffs argued that these admissions constituted "endorsement or ratification of Neimann's unconstitutional conduct, automatically giving rise to municipal liability" under *Monell*. The district court rejected this argument: "The court views the admissions . . . only as an acknowledgement that the defendant police officers acted pursuant to existing policies and training, none of which specifically addressed the enforcement of the anti-picketing ordinance. . . . ***The admissions are not the equivalent of an affirmative decision, cast in the form of a policy statement, to ignore training***

deficiencies or to completely omit training about the proper enforcement of the residential anti-picketing ordinance." *Ibid.* (emphasis added).

By contrast, and without much analysis, *Stachan v. City of Federal Heights, supra,* 837 F.Supp. 1086, held that a request for admission that an officer's entry into a home and shooting of plaintiff was in conformance with city policy could establish a policy for purposes of *Monell*, the only question being whether the policy was unconstitutional. *Id.* at 1092.

This Court has not directly addressed the issue in prior rulings, although at least some courts have correctly interpreted *Monell* and its progeny as requiring that such admissions be viewed with skepticism. In light of the lower courts' inconsistent treatment of the issue, this Court should clarify (a) the place for requests for admissions of this type in establishing *Monell* liability, and (b) the level of specificity needed to treat such admissions as binding, so as to prevent the lower courts from eviscerating the necessary distinction between municipal and vicarious liability.

III

This Court Should Decide Whether Civil Rights Plaintiffs Alleging Deprivation of Rights in Family or Dependency Proceedings Should be Required to First Show That They Would Have Prevailed in Those Proceedings.

The California Court of Appeal rejected petitioners' contention, based on *Heck v. Humphrey,* 512 U.S. 477 (1994), that a rule developed in criminal cases requiring a reversal or vacation of the criminal judgment to demonstrate the plaintiff was directly harmed by the underlying misconduct should be applied to dependency or family law proceedings. In *Heck*, this Court held:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C. Section 1983] plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. [Section] 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under [42 U.S.C. Section 1983].

512 U.S. at 486-487.

The California Court of Appeal distinguished *Heck* "for the obvious reason that a dependency case

is not a criminal action." App. 27. The Court of Appeal also held that "the numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for 'expungement' of a dependency dispositional order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention), we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding." App. 27.

This Court should decide whether these so-called "distinctions" pass muster under federal civil rights law. Petitioners submit that they cannot. Under *Heck*'s teachings, state prisoners challenging convictions on constitutional grounds must not only exhaust their habeas remedies, but they must exhaust their state appellate remedies – remedies that are applicable to both civil and criminal litigants. Thus, *Heck* teaches that if a prisoner has not reversed his conviction either by direct appeal or writ of habeas corpus (the latter only because of the criminal nature of the proceeding), a civil damages claim is barred. *Ramirez v. County of Los Angeles*, 397 F.Supp.2d 1208, 1221-1222 (C.D. Cal. 2005); *Taylor v. Sullivan*, 980 F.Supp. 697, 705 (S.D.N.Y. 1997), *affd.*, 166 F.3d 1201 (2d Cir. 1998).

Moreover, those federal courts that have considered the issue have extended *Heck* beyond criminal proceedings to, for example, civil commitment proceedings. *See e.g., Huftile v. LC Miccio-Fonseca*, 410

F.3d 1136, 1138-1140 (9th Cir. 2005). The favorable termination rule crafted by this Court in *Heck* is one that derives from civil law (by analogy from malicious prosecution) and that is applied in civil cases. There is no reason in law or policy that civil cases seeking damages for violations of constitutional rights based on judgments and orders procured by false testimony should be exempted from a favorable termination rule that applies in the criminal context.

Deanna never sought appellate review of the challenged dependency court's determinations. Rather, she stipulated that Cary would have temporary custody in the dependency court. The family court then awarded full custody to Cary. Again, Deanna never appealed this determination.

Moreover, the family court order demonstrates that there was ample cause – unconnected with anything that happened in the dependency court – not to award custody to Deanna. Thus, the family court's award of custody to Cary acknowledges that there was cause – unrelated to anything the social workers did – not to leave the children in Deanna's custody. Even in the absence of the dependency proceedings, the family law court would have awarded custody to Cary, and Deanna could not demonstrate that the result (her loss of custody) would have been any different. This then defeats any ability to meet the heightened causation standard required under *Monell, City of Canton,* and *Bryan County*.

If state courts are allowed to reject federal rules and precedents that apply to Section 1983 damages action, or to apply federal precedents inconsistently with the federal court's interpretation of Section 1983, this can only serve to effectuate an incoherent and haphazard application of federal law. In this case, it did away with any requirement that Deanna meet the stringent culpability and causation requirements for a *Monell* claim.

IV

The California Court of Appeal's Opinion Finding Waiver of Absolute Immunity is Inconsistent With Federal Court Precedents.

Absolute immunity is a critical defense for governmental entities in civil rights cases. It can protect prosecutors, police officers, and social workers from lawsuits arising from the performance of their duties on behalf of the public. *See Van de Kamp v. Goldstein,* ___ U.S. ___, ___, 129 S. Ct. 855, 860 (2009).

The California Court of Appeal held that the County's failure to plead absolute immunity in its answer operated as a waiver. Numerous federal cases have held that, regardless of whether the defense is absolute or qualified immunity (*Ireland v. Tunis,* 907 F.Supp. 1088, 1095 (E.D. Mich. 1995)), the critical inquiry is whether the defense is *raised,* not whether it is *pleaded*:

"Defendants must raise the . . . immunity defense in order to benefit from the substantial shield it

affords. [Citation.] Defendants may do this in their answer, or in a motion to dismiss or a motion for summary judgment. [Citation.] Defendants who are unsuccessful in having a lawsuit dismissed on qualified immunity grounds before trial may reassert the defense at trial or after trial. [Citations.] But in order to benefit from the defense Defendants must raise it." *Quezada v. County of Bernalillo,* 944 F.2d 710, 718 (10th Cir. 1991); *accord*, *Cozzo v. Tangipahoa Parish Council-President Government,* 279 F.3d 273, 283 (5th Cir. 2002); *Collyer v. Darling,* 98 F.3d 211, 222 (6th Cir. 1996).

Here, the County raised the issue of absolute immunity in the Court of Appeal (twice), in its initial challenge to the pleadings, in its motion for summary judgment, and its motion for judgment notwithstanding the verdict. Moreover, due to the multiple times it was raised, Deanna was not prejudiced by any failure to separately plead the defense.

"The conclusion that there has been a waiver of immunity will not be lightly inferred." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959). This court should decide whether a governmental entity waives the immunity defense under these circumstances.

CONCLUSION

Governmental entities face enormous challenges in their efforts to provide public services with ever-decreasing resources. The California Court of Appeal's opinion finds municipal liability based solely on one case or answers to generic requests for admission, renders prior judicial proceedings meaningless, and finds waiver of absolute immunity even though the defense was raised. This Court should grant certiorari to address any or all of these vital issues.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Respondent, v. COUNTY OF ORANGE et al., Defendants and Appellants.	G039045 (Super. Ct. No. 01CC02379) OPINION (Filed Jun. 14, 2010)

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Reversed in part and remanded with directions.

Buchalter Nemer, Robert M. Dato and Efrat M. Cogan; Beam, Brobeck, West, Borges & Rosa, Byron J. Beam and Glen A. Stebens, for Defendants and Appellants.

Law Offices of Shawn A. McMillan, Shawn A. McMillan, Sondra Sutherland and Jody Hausman; Law Offices of Donnie R. Cox, Donnie R. Cox and Dennis B. Atchley, for Plaintiff and Respondent.

The County of Orange, along with two of its social workers, Marcie Vreeken and Helen Dwojak (collectively the County), appeals from a substantial monetary judgment in favor of Deanna Fogarty-Hardwick for damages caused by the County's violation of her federal civil rights.[1] Specifically, the County was found liable based upon improper conduct by the social workers, which caused Fogarty-Hardwick to lose custody of her two daughters in a dependency proceeding.[2]

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[1] Section 1 of the Civil Rights Act of 1871, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." (42 U.S.C. § 1983, rev. stat. § 1979.)

[2] The County has filed two requests for judicial notice. The first was filed in conjunction with its opening brief on appeal, and asks us to judicially notice portions of the records in the underlying dependency court and family court proceedings. The County contends the documents provide evidentiary support for arguments advanced in the opening brief. The second request was filed in conjunction with the County's reply brief, and asks us to judicially notice a different part of the record in the dependency case, which it contends would refute evidence relied

(Continued on following page)

Although the County makes numerous arguments challenging liability in this case, none of them is persuasive. Similarly, we reject the County's challenge to the amount of damages awarded, and to the trial court's use of a "multiplier" in connection with its award of attorney fees to Fogarty-Hardwick.

However, we do conclude the trial court erred by awarding injunctive relief against the County, and remand the case to the trial court with directions to strike that injunctive relief from the judgment. In all other respects, the judgment is affirmed.

FACTS

Fogarty-Hardwick and her former husband separated in 1995, and obtained a status-only judgment of dissolution in early 1998. The couple has two daughters, K. and P. K. is autistic. Initially, Fogarty-Hardwick had primary custody of the girls, with her former husband having custody three weekends per month. However, in late 1999, the husband made a motion in the family court for full custody, claiming he had difficulty coparenting with Fogarty-Hardwick.

In November of 1999, Fogarty-Hardwick brought K. to the therapist who had been engaged to help the

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upon by Fogarty-Hardwick in her respondent's brief. None of these portions of the dependency case record was in evidence at trial; nor does the County contend it asked the trial court to take judicial notice of them. We consequently deny both requests for judicial notice.

girls "adjust[ ] to their father's recent remarriage." They reported to the therapist that Fogarty-Hardwick's former husband had sexually abused K. The therapist was under a mandatory duty to report such allegations to authorities, and she did so.

As a result of the therapist's report, the Orange County Social Services Agency (SSA) filed a dependency petition alleging the two daughters were at risk of serious physical harm or illness, and sexual abuse. At the initial detention hearing on November 19, 1999, the court ordered the children remain in the custody of Fogarty-Hardwick, with her former husband allowed monitored visitation. Although another social worker was initially assigned to the case, Vreeken succeeded her in fairly short order. Dwojak was Vreeken's supervisor, and also had some direct involvement in the handling of the case.

Unfortunately, there were problems with the former husband's visitation, and disputes arose as to who was responsible for those problems. Among other things, the daughters were uncooperative, and apparently expressed unwillingness to visit with their father. Additionally, K. made allegations of misconduct against one of the monitors, and he was replaced for a period of time.

On February 8, 2000, SSA filed an amended petition, adding allegations that K. had been placed in the middle of her parents' deteriorating relationship; that Fogarty-Hardwick had made derogatory comments to her, causing her to suffer "anxious

attachment" to Fogarty-Hardwick; and that Fogarty-Hardwick's "hypervigilant attitude" toward her former husband and his new wife had caused K. to suffer emotional distress.

On February 13, 2000, Fogarty-Hardwick brought her daughters to a monitored visit with their father. The daughters resisted, and although the monitor tried to coax them, he was unsuccessful, and Fogarty-Hardwick ultimately took them home. Two days later, Fogarty-Hardwick brought the girls for another monitored visit at the SSA office. The visit itself went well, but in its wake, Vreeken spoke with both girls, telling them they were *required* to visit with their father, and "if they didn't visit with their father, the judge was going to put them in a home." This caused both girls to become frightened and start to cry. P. ran to get her mother, leaving K. alone with Vreeken. When Vreeken brought K. to join P. and Fogarty-Hardwick, K.'s face was discolored and her eyes were swollen.

Vreeken informed Fogarty-Hardwick (apparently outside of the children's presence) that she had told the children they would be placed in a home if they didn't visit with their father, which upset Fogarty-Hardwick to such a degree that she vomited. She begged Vreeken for guidance as to what more she could do, because she didn't want to lose her daughters. Vreeken responded with "you'd better call your attorney."

On February 17, 2000, two days after that disastrous meeting, the court held a hearing on the allegations of the amended petition. In connection with the hearing, the court had an off-the-record discussion with counsel, and also a discussion with Vreeken. Vreeken made false allegations against Fogarty-Hardwick, including assertions that she had caused her daughters to skip a mandatory visit with their father, and that she had told the children that their father was trying to take them away from her. In reality, it was Vreeken, and not Fogarty-Hardwick, who had made inappropriate comments to the children, including the threat that if they did not visit with their father, they would be put "in a home." The social workers also alleged Fogarty-Hardwick had been responsible for turning K. against the visitation monitor.

Although Fogarty-Hardwick denied all these things, the court nonetheless concluded, based upon the evidence of Fogarty-Hardwick's conduct as reported by the social workers, that she was "using these children." The court emphasized "[t]here is no question in my mind, based on what I have got right now before me, that that's what's going on." The court acknowledged that Fogarty-Hardwick denied engaging in the conduct the social workers had accused her of, and noted: "it may well be that you are right and you didn't say these things, but from the evidence I have before me right now, it looks like you [did.] And just as at the detention hearing, I have got to be looking out for the welfare of these children. I have

got to do that today, too, based on what I have before me right now. . . . I think I have no other choice but to do that. [¶] So I am going to find that it's of immediate and urgent necessity for the protection of these children that they be removed from your home. . . ." The children were taken into SSA custody that same day.

The social workers then filed a second-amended petition on February 23, 2000, in which they reiterated, as official allegations, the false claims they had made to the court at the February 17 hearing.

After the girls were removed from Fogarty-Hardwick's custody, they were placed in the Orangewood Children's Home, where they remained for more than a month. Fogarty-Hardwick was restricted to supervised visitation. Although the court authorized SSA to return the girls to Fogarty-Hardwick's custody on February 23, 2000, the social workers refused to do so. Instead, on March 21, 2000, the girls were moved to foster care, where they remained until May of 2000.

Meanwhile, on March 1, 2000, after a trial setting conference, Vreeken engaged in a highly charged conversation with Fogarty-Hardwick concerning the false claims made by the social workers about Fogarty-Hardwick's conduct. Vreeken got angry, and threatened that if Fogarty-Hardwick did not "submit" to her will, she would "never see [her] kids again." And while both girls, and especially K., exhibited significant emotional distress in their placement,

which was reported to SSA by their therapist, that information was not conveyed to the court by the social workers. Instead, Vreeken falsely claimed, under oath in testimony before the court, that the children were doing well.

Both social workers also demeaned Fogarty-Hardwick to others involved in the case, portraying her as a spoiled beauty queen who was born with all the advantages and was used to getting her way.

In May of 2000, the dependency court ordered an evaluation of the children by a licensed family therapist, in an effort to determine the truth of K.'s assertion that her father had molested her, and the extent to which the parents' conduct was otherwise causing the children to suffer emotional distress. In her report, the therapist concluded that neither parent would knowingly abuse the children, and neither posed any significant risk of physical harm to the children. She believed K.'s accusation of sexual abuse had been "too coincidental" to be credible, and did not appear "spontaneous." The therapist did not conclude that Fogarty-Hardwick had made any conscious effort to encourage K. to make a false claim of sexual abuse, but believed that due to K.'s autism, she was less able to differentiate between her own experiences and what she had been told. Thus, Fogarty-Hardwick's own fears and preoccupation with the issue had unduly influenced K.'s perceptions.

The therapist also found that both parents had inflicted some degree of emotional abuse on the

children, by virtue of their difficult relationship, but that the father was more able to differentiate between his own needs and those of his children, and was thus better at shielding the children from his emotional issues.

The therapist concluded that while Fogarty-Hardwick's visits with the children should remain monitored, her former husband should be allowed unrestricted contact.

Ultimately, on May 19, 2000, Fogarty-Hardwick signed a voluntary case plan, which provided the dependency case would be dismissed, and the children released from foster care, upon certain conditions. Specifically, the children would be released into the temporary custody of their father, and Fogarty-Hardwick would be restricted to monitored visitation, which could be increased, and the terms liberalized, as she complied with the requirements of the plan.

Fogarty-Hardwick believed that her acquiescence in the plan was necessary to get her children out of foster care, and felt that she had no choice but to agree, given the difficulties suffered by the children while in foster care. Once the plan was signed, the dependency case was dismissed, and the custody issue was transferred back to the family court.

Despite Fogarty-Hardwick's complaints, and the concerns expressed by others about the handling of this dependency case, SSA did not investigate the situation or consider assigning different social workers to the matter. Neither of the social workers

involved was disciplined. Instead, Vreeken was promoted to supervisor in 2001.

The custody proceedings in family court were protracted, and the court did not enter a final custody order until December of 2001. In that order, it awarded legal and physical custody of the children to Fogarty-Hardwick's former husband. However, as the County acknowledges, while the family court concluded that no sexual abuse had occurred, it "believed Deanna thought the [child abuse] accusation to be true . . . ," and thus made no determination she had acted in bad faith in connection with the dependency proceedings.

Fogarty-Hardwick finally regained shared custody of her daughters in June of 2006. She had filed this lawsuit in February of 2001, alleging tort causes of action based upon state law, as well as causes of action under federal law, which sought damages based upon alleged violations of her constitutional right to familial association. The basis of these causes of action was Fogarty-Hardwick's allegation that the County's social workers had relied upon "intentional[ly] false statements," fabricated evidence, and "perjury" as part of a successful effort to convince the juvenile court to remove her daughters from her custody and place them in foster care.

Fogarty-Hardwick also alleged the social workers deliberately withheld information from the court concerning the emotional detriment suffered by her daughters while in foster placement, and thereby

convinced the court to extend the children's placement. Fogarty-Hardwick also asserted the County had a policy of "deliberate indifference" to the rights of parents in her situation, and as a result of that policy, the County failed to supervise, control or direct the conduct of its social workers.

The County challenged several iterations of Fogarty-Hardwick's complaint, and relied upon collateral estoppel and absolute immunity under state law as the bases for its demurrer to her second amended complaint. Although the trial court sustained that demurrer in its entirety without leave to amend, this court determined the ruling was correct only as to the state law tort claims. Rather than relying upon the arguments made by the trial court in sustaining the demurrer, we concluded Fogarty-Hardwick had failed to state a cause of action under state law. However, we also concluded the causes of action based upon the alleged violation of Fogarty-Hardwick's federal civil rights had been properly alleged, and reversed the judgment with directions to overrule the demurrer with respect to those claims. (*Fogarty-Hardwick v. County of Orange* (Mar. 29, 2004, G030302) [nonpub. opn.].)

In that prior opinion, we noted that while the County had relied upon absolute immunity in its original appellate briefs, it had omitted any reference to the defense in a supplemental brief filed in response to this court's invitation for further briefing with respect to the federal civil rights claims. We suggested the omission reflected the County's

recognition that a then-recent decision of the Ninth Circuit Court of Appeals, *Miller v. Gammie* (9th Cir. 2002) 335 F. 3d. 889, "holds that social workers have absolute immunity only for the quasi-prosecutorial decision to institute dependency proceedings. Beyond that, the burden is on a social worker defendant to show that other functions he or she performed are similar to conduct accorded absolute prosecutorial immunity at common law." (*Fogarty-Hardwick v. County of Orange, supra,* G030302, p. 14.) We then noted that the claims asserted by Fogarty-Hardwick included conduct occurring after the initiation of the dependency case, and thus that "the demurrer to the federal claims cannot be sustained on this ground." (*Id.* at p. 15.) We specifically left it to the trial court, on remand, "to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion." (*Ibid.*)

In its answer to the second amended complaint, the County pleaded the affirmative defense of qualified immunity, but did not plead the defense of absolute immunity. The parties then conducted discovery.

In April of 2006, the County moved for summary judgment, arguing (among other things) that (1) all of the wrongful conduct alleged against the social workers qualified as "quasi-prosecutorial," and was thus protected by absolute immunity; and (2) the alleged conduct fell within the absolute testimonial privilege. Deanna opposed the motion, arguing the defense of absolute immunity had been waived by the County's

failure to plead it, and the court denied the motion in October of 2006.

In December of 2006, less than a month before trial was scheduled to commence, the County filed a noticed motion for leave to amend its answer to include the defense of "absolute, judicial, prosecutorial and testimony privilege of federal law." In doing so, the County specifically requested the court to exercise its discretion to allow the late amendment "in the furtherance of justice." Fogarty-Hardwick opposed the attempt, arguing she would be prejudiced by the late addition of an absolute immunity defense. The trial court agreed, and denied the motion.

At the completion of trial, the jury returned special verdicts in favor of Fogarty-Hardwick. The jury found that both Vreeken and Dwojak "intentionally violate[d] the plaintiff's right to familial association or right to privacy"; that they did so "while acting or purporting to act in the performance of their official duties"; and that their conduct was a substantial factor in causing harm to Fogarty-Hardwick. In connection with the misconduct of Vreeken, the jury answered the question "What are Deanna Fogarty-Hardwick's damages?" with a total of $117,386, including past and future economic loss, and past and future non-economic loss. In connection with the misconduct of Dwojak, the jury answered the same question by concluding Fogarty-Hardwick's "damages" totaled $273,900 including past and future economic loss, and past and future non-economic loss.

In a separate special verdict form the jury concluded that Vreeken and Dwojak's conduct occurred "as a result of the official policy or custom of the County of Orange," and in connection with that verdict, the jury concluded Fogarty-Hardwick's damages were $2,260,785, including past and future economic loss, and past and future non-economic loss.

The jury also concluded that the County was "deliberately indifferent to the need to train and/or supervise its employees adequately," and that failure was both the cause of Fogarty-Hardwick's loss of familial association and a substantial factor in causing harm to her. In connection with that special verdict, the jury concluded Fogarty-Hardwick's damages totaled $2,260,785, including past and future economic loss, and past and future non-economic loss.

With respect to damages specifically, the jury returned a special verdict concluding that "regardless of the award of damages in [the other verdict forms] . . . , the total damages suffered by" Fogarty-Hardwick were $411,456 in past economic losses; $36,400 in future economic losses; $2,810,000 in past non-economic losses; and $1,655,010 in future non-economic losses. These "total damage" numbers add up to $4,912,866 – the same total reached by adding up the separate damage amounts assessed against each defendant (including *both* damage amounts of $2,260,785 assessed against the County.)

Finally, the jury found that both Vreeken and Dwojak acted with "malice, oppression or fraud." The

jury assessed punitive damages against Vreeken in the amount of $1,800, and against Dwojak in the amount of $4,200.

The court entered judgment in favor of Fogarty-Hardwick and against: (1) Vreeken in the amount of $119,186; Dwojak in the amount of $278,100; and the County of Orange in the amount of $4,521,570. The court also issued an injunction prohibiting SSA from (1) "including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and aticulable [*sic*] evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian,* or is in imminent danger of abuse, neglect or abandonment by that parent"; or (2) requiring a parent or guardian to sign its "'Agency-Parent Temporary Agreement'" or releases of confidential information (e.g., medical, psychological[,] psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent."

After the entry of judgment, the County moved for a judgment notwithstanding the verdict, arguing that defendants were entitled to absolute immunity under federal law. The County acknowledged the court had earlier refused to allow this defense, but

asserted the issue had been properly raised and was supported by the evidence adduced at trial. The County also moved for a new trial, arguing the court had abused its discretion in denying its pretrial motion to add the defense of absolute immunity to its answer. The court denied both motions, and, in doing so, reiterated its conclusion the County had waived the defense of absolute immunity.

I

The County first argues Fogarty-Hardwick's claims are barred in their entirety, because this case represented an attempt to "relitigate" the issue of custody, which was already "fully litigated" in both the dependency and family law cases.

We disagree. The County's argument ignores the fact that custody orders are, by their nature, sui generis. A court's analysis of what custody arrangement would be in the best interests of the children is based upon an evaluation of facts and circumstances as they exist *at the time the order is made,* and such orders – even if deemed "permanent" – may be altered and modified based upon a significant change in circumstances affecting the court's evaluation of what custody arrangement is currently in the child's best interests. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256; Fam. Code, §§ 3011, 3020, 3022, 3087.) Thus, a custody order establishes nothing more than what arrangement is in the children's best interests, in

light of the circumstances found to exist on the date it issued.

Consequently, the fact a family court ultimately ordered that Fogarty-Hardwick's former husband would retain custody of her two daughters in December of 2001 – a year and a half after he had been given temporary custody (and Fogarty-Hardwick only limited visitation) as a result of the dependency case – *in no way* establishes that the same order would also have been made back in February of 2000, when Fogarty-Hardwick herself still enjoyed primary custody.

Clearly, the dependency case itself was an enormous change in circumstances. Even aside from the change in custody that directly resulted from it, we are certain the court in the family law case would have presumed the dependency case had been handled appropriately; that the juvenile court's decision to remove the girls from Fogarty-Hardwick's custody and place them in foster care had been based upon truthful and sufficient evidence, and that the stipulated termination of that dependency proceeding reflected both parents' voluntary acquiescence in the conditions imposed upon them.

None of those very significant presumptions would have played any part of a custody determination made by the family court in February of 2000. Consequently, there is simply no basis for assuming the family court would have taken custody away from

Fogarty-Hardwick, and awarded it to her husband, had it been asked to rule on the issue at that time.

Likewise, the stipulated termination of the dependency case, which awarded temporary custody of the girls to Fogarty-Hardwick's former husband, is an insufficient basis to support a finding of collateral estoppel. Even more so than the later custody order, the stipulated termination of the dependency case was very much *the product* of the particular circumstances and events leading up to it – and specifically of the social workers' misconduct in that case.

Had the social workers not wrongfully caused the girls to be taken from Fogarty-Hardwick's custody and placed in foster care, there is nothing in the record suggesting she would have voluntarily agreed to relinquish custody. To the contrary, Fogarty-Hardwick testified she did so *only* because she felt coerced by the social workers, and believed she had no other choice if she wanted to free her daughters from foster care. Because the outcome of the dependency case was irretrievably prejudiced by the very misconduct which is at the core of this case, it cannot be cited as evidence of what would have happened in the absence of that misconduct. We cannot engage in the kind of "boot-strapping" that would allow the County to rely upon the outcome of the tainted dependency case as a basis to avoid liability for the very acts which tainted it.

Buesa v. City of Los Angeles (2009) 177 Cal.App.4th 1537, cited by the County in a letter filed

after briefing was completed, does not alter our collateral estoppel analysis. According to the County, *Buesa* stands for the proposition that "perjury" can never form the basis of a collateral attack on a judgment. As applied here, the County's argument seems to be that the specific dispositional order depriving Fogarty-Hardwick of custody in the dependency case is presumed to be "correct," and cannot be collaterally attacked on the basis it was obtained through perjured testimony. *Buesa* is distinguishable.

In *Buesa,* police officers filed an action for damages against the City of Los Angeles, based upon the wrongful termination of their employment. The court dismissed the action, citing collateral estoppel based upon an earlier writ of mandate action in which the officers unsuccessfully sought a court order requiring the city to reinstate them. The "central issue" in the mandate action had been the officers' contention that the disciplinary action which resulted in their terminations was barred by the statute of limitations contained in the Public Safety Officers Procedural Bill of Rights Act, commonly referred to as POBRA. (Gov. Code, § 3300 et seq.) (*Id.* at p. 1548.) However, the City successfully contended that limitations period had been tolled for a sufficient period to render the disciplinary action timely.

In the subsequent damages action, the officers alleged the court's calculation of the tolling period in the mandate action was based upon the perjured testimony of a city witness, and sought damages (rather than reinstatement of their employment) as a

result of the City's violation of their rights under POBRA. Thus, in *Buesa,* the officers had simply filed two successive actions – the first seeking equitable relief, and the second seeking damages – based upon the *identical assertion* that the city had previously violated their rights when it initiated disciplinary action in violation of the POBRA statute of limitations. The officers' assertion of perjury in the mandate proceeding was nothing more than a justification for allowing them to *relitigate* the same statute of limitations issue in the damages case, so it amounted to an assertion the prior mandate judgment should be disregarded on the basis of *intrinsic* fraud, which has never been an acceptable basis for attacking a final judgment. (*Pico v. Cohn* (1891) 91 Cal. 129; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1.)

In this case, by contrast, Fogarty-Hardwick did not initiate successive proceedings, each seeking relief against the same party, based upon the same prior acts of misconduct and the same injury. Stated simply, her injuries *arose out of* the proceeding in which the perjury occurred, i.e., the corrupted dependency proceeding, and she had no ability to assert any claim based upon those injuries within *that proceeding.* Collateral estoppel will not be applied unless "the party against whom the earlier decision is asserted had a 'full and fair' opportunity to litigate the issue." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90.) And it will not be applied "if injustice would result or if the public

interest requires that relitigation not be foreclosed." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888.)

More fundamentally, the County's attempt to give collateral estoppel effect to the dispositional order in a dependency case ignores the special nature of such proceedings, which may include successive "final" orders which are not really intended to be *final* in the manner of an order issued in other cases.

Dependency cases are, by their nature, fluid, and specifically intended to address the present and future interests and needs of the affected children. As explained in *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, all juvenile court orders made during the pendency of the case, even those deemed "final" and no longer subject to appeal, are considered inherently changeable pursuant to Welfare and Institutions Code section 388, and are thus not entitled to the same res judicata or collateral estoppel effect that attach to other judgments. "In light of the ongoing nature of the proceedings and the express statutory authority permitting modification, principles of res judicata and collateral estoppel do not bar a modification of a [final] dispositional order. . . ." (*Id.* at p. 879.)

Moreover, the fluid nature of dependency proceedings, and the paramount need to protect the well-being of the children, require these proceedings to

move very quickly in response to alleged changes in circumstances, especially with respect to any assertion a child is currently at risk of harm. "Dependency proceedings are part of a comprehensive statutory scheme geared toward expediency, largely to serve the dependent child's best interests. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152.) 'Of the many private and public concerns which collide in a dependency proceeding, time is among the most important.' (*Ibid.*)" (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 635.)

Unfortunately, a rule requiring the rigid application of collateral estoppel to the intentionally fluid interim decision-making of a dependency court, would inevitably encourage parties to litigate more aggressively, and even to launch collateral challenges to those decisions during the pendency of the proceeding. In this case specifically, the County is arguing that Fogarty-Hardwick was bound by the court's February 17, 2000 order, removing her children from her custody, because she never had that ruling overturned. But given the nature of Fogarty-Hardwick's challenge to that ruling – that it was based upon the social workers' falsified evidence – her only avenue for doing so would have been to file a writ of habeas corpus; such a claim would not be cognizable in an ordinary appeal. Thus, what the County is proposing is a rule which requires a parent to engage in collateral attacks on the validity of prior dependency orders (and on the integrity of the social workers),

during the dependency case itself, if they wish to preserve any civil claims.

We conclude that such a requirement would be inconsistent with the special nature of dependency proceedings and would interfere with the interests intended to be served in those proceedings. The better policy is to encourage all participants in a dependency action to maintain their focus *on the children,* and to work together as much as possible to quickly address *their* needs on a going-forward basis. To the extent *that focus* requires a parent to directly challenge the actions or motivations of a social worker, then such a challenge would be appropriate. But a requirement that such a challenge be fully litigated *in the dependency proceeding,* merely to preserve the parent's right to maintain a future damages action, would not be.[3] (See *In re Claudia E., supra,* 163 Cal.App.4th at p. 637 [characterizing the habeas corpus remedy as "a time-consuming process that is inimical to the expedient processing of cases and one

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[3] And of course, the natural tendency of a parent who wishes to maintain (or regain) custody of the children would be to curry favor with the social workers, not alienate them. In this case, even after the relationship between Fogarty-Hardwick and Vreeken had broken down, Fogarty-Hardwick continued to seek guidance from Vreeken, and to try to satisfy her concerns relating to the underlying issues. That spirit of cooperation – even in a flawed relationship – is to be encouraged, and would be undermined by the initiation of collateral litigation which questioned the social worker's professionalism and integrity.

which most likely will be impractical in the crowded dependency system."].)

In *People v. Percifull* (1992) 9 Cal.App.4th 1457, the appellate court relied upon the special nature and purposes of a dependency case in denying collateral estoppel effect to a dependency court's judgment exonerating a parent of a charge he had committed an act which also constituted the felony of child cruelty. The court noted that while a conviction of the parent on that felony charge would be "inconsistent" with the judgment of the juvenile court, according collateral estoppel effect to that judgment would be inappropriate considering the extent to which "the two proceedings serve different public interests and purposes. . . ." (*Id.* at p. 1461.)

We conclude a similar analysis is proper here. The goal of the dependency case was to protect the children, and the court's need to act quickly to fulfill that goal would have been undermined by a rule essentially requiring Fogarty-Hardwick to pursue any claim for perjury or falsification of evidence she might wish to bring against the social workers prior to the conclusion of that proceeding.

II

The County also argues the judgment must be reversed because – while it grudgingly admits Fogarty-Hardwick provided the jury with sufficient evidence to demonstrate the social workers committed egregious acts of misconduct in the dependency

case,[4] – it also contends the circumstances of this case demonstrate, as a matter of law, that the misconduct did not *cause* Fogarty-Hardwick to lose custody of her children in the dependency case.

The County first contends that events occurring after the children were removed from Fogarty-Hardwick's custody in the dependency case, including the stipulated termination of that dependency case, in which the children were released to the custody of Fogarty-Hardwick's former husband, and the family court's ultimate award of custody to the former husband – demonstrate Fogarty-Hardwick was destined to have lost custody in any event.

We find the contention, which amounts to a restatement of the collateral estoppel argument, unpersuasive. As we have already explained, the outcome of the dependency case, as well as the later award of permanent custody to Fogarty-Hardwick's former husband in 2001, were both profoundly influenced by the dependency court's initial decision to remove the children from Fogarty-Hardwick's custody; and that order was, in turn, caused by the misconduct of the social workers. There is no compelling reason to conclude that, in the absence of the

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[4] As the County concedes, "[Fogarty-Hardwick] demonstrated (if the testimony is to be believed) that in this one instance, social workers lied and fabricated evidence in connection with the dependency proceedings relating to [her] children."

misconduct, those subsequent custody orders would have been the same.[5]

Second, the County relies upon civil rights claims arising out of criminal cases, and argues that a rule developed therein which requires a reversal or vacation of the criminal judgment itself to demonstrate the plaintiff was directly harmed by the underlying misconduct, should be applied to dependency proceedings as well.

The contention is based upon *Heck v. Humphrey* (1994) 512 U.S. 477, in which the Supreme Court held "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C. section 1983] plaintiff must prove that the conviction or sentence has been reversed on direct appeal,

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[5] Based upon the same analysis, we also reject the County's related assertion that Fogarty-Hardwick's claim for damages was "cut off" as of the date she signed the voluntary case plan which provided for termination of the dependency case and an award of temporary custody to her former husband. There was substantial evidence supporting the inference Fogarty-Hardwick would never have agreed to such an arrangement in the absence of the social worker's misconduct, and that her acquiescence was anything but "voluntary." Similarly, the family court's subsequent award of permanent custody to the husband did not preclude Fogarty-Hardwick's claim for damages past that time. As we have explained, that order must have been significantly affected by the events and outcome of the dependency case; it would thus be more properly construed as evidence of her *continuing damages*.

expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. [section] 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under [42 U.S.C. section 1983]." (*Id.* at pp. 486-487.)

But as the Supreme Court explained in *Heck*, its conclusion was based upon "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments. . . ." (*Heck v. Humphrey, supra*, 512 U.S. at p. 486.) And of course, that principle is not applicable here, for the obvious reason that a dependency case is not a criminal action. Moreover, the numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for "expungement" of a dependency dispositional order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention),[6] we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding. We therefore

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[6] As a general rule, release of the detained individual would render a request for habeas corpus relief moot. (*In re Stinnette* (1979) 94 Cal.App.3d 800, 803.)

decline to extend this rule applicable to criminal convictions and sentences to the challenged ruling in the underlying dependency case.

Finally, the County argues that the oral statements made by the dependency court, explaining its decision to remove Fogarty-Hardwick's children from her custody in February of 2000, demonstrate the decision was not actually motivated by the social workers' lies, but was instead based upon the court's concern that Fogarty-Hardwick "was using her children and thus interfering with visitation."

There are several problems with this assertion as a basis for challenging the jury's finding of causation, not least of which are (1) that the contention effectively asks us to *interpret* the court's comments in a manner which favors the County, which is inconsistent with our obligation to indulge all inferences in favor of the judgment; and (2) that one of the lies told by the social worker was that Fogarty-Hardwick *had caused her daughters to miss a visit with their father,* which would presumably have provided direct support for the court's conclusion she was "interfering with visitation."

But the most significant problem with the County's contention is that it amounts to an attack on the sufficiency of the evidence to support causation – an attack launched without acknowledging the heavy burden imposed on an appellant who does so.

"An appellate court '"must *presume* that the record contains evidence to support every finding of

fact. . . ."' (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887, italics added; see *Brown v. World Church* (1969) 272 Cal.App.2d 684, 690, ['"a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact"'].) It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. (*Brown v. World Church, supra,* 272 Cal.App.2d 684, 690.) This burden is a 'daunting' one. (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable,* and *show how and why it is insufficient.* [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.' (*Hickson v. Thielman* (1956) 147 Cal.App.2d 11, 14-15.)" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

Moreover, the appellant's burden to provide a fair summary of the evidence "grows with the complexity of the record." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) The record before us is quite substantial (including 14 volumes of reporter's transcript, and 11 volumes of clerk's transcript.) And yet the County supports its attack on the

sufficiency of the evidence to support causation with nothing more than a single piece of evidence, which it asks us to *interpret* favorably to it. We find the effort inadequate and the argument unpersuasive.

III

The County next argues its liability to Fogarty-Hardwick is precluded by the defense of absolute immunity. In doing so, however, the County simply addresses the merits of that defense, making the somewhat controversial assertion that it should be applied to all misconduct of a social worker in connection with a dependency court proceeding (but see *Miller v. Gammie, supra,* 335 F.3d. 889 [explaining why qualified immunity is the defense more generally applicable in such cases]; and *Beltran v. Santa Clara County* (9th Cir. 2008) 514 F.3d. 906, 908 [concluding social workers "are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute."])

However, what the County does not do is acknowledge that the trial court deemed the absolute immunity defense to have been *waived* in the proceedings below (See *Collyer v. Darling* (6th Cir. 1996) 98 F.3d 211, 222 ["Given that the defense of absolute immunity was not affirmatively pleaded or argued . . . and in light of the significant distinctions between

qualified and absolute immunity claims, this defense was affirmatively waived. . . ."].) And having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it.

In particular, the County does not even *mention* in its opening brief on appeal that it failed to plead absolute immunity as a defense in its answer, or that it moved to add the defense to its answer only shortly before trial. We find it quite remarkable that opening brief does not acknowledge that the court denied that motion as untimely, and that the County did not include that order as part of the record on appeal.[7]

"One of the essential rules of appellate law is that '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]' (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) It is the duty of the appellant to present an adequate record to the court from which prejudicial error is shown. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1533.)" (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.)

Here, we are required to begin with the presumption the court ruled correctly when it denied the County leave to add the absolute immunity defense to

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[7] The County's motion to amend its answer is included in the record, along with Fogarty-Hardwick's opposition. The County admits, in its reply brief, that the motion was denied.

its answer prior to trial. The County having failed to even claim, let alone establish, that ruling amounted to error, we must affirm the trial court's determination the defense of absolute immunity was waived.

IV

The County also contends liability was precluded by the defense of qualified immunity, but its argument seems to be predicated on the idea that Fogarty-Hardwick had to satisfy a distinct burden of proving causation in connection with the defense – apparently a different element of causation than the one she satisfied in connection with her prima facie case – and that she purportedly failed to do so.

Specifically, the County relies on *Ramirez v. County of Los Angeles* (2005) 397 F.Supp.2d 1208, which it contends stands for the proposition that in order to "defeat qualified immunity" in a case where governmental actors falsified information to the court and deceived the court, . . . a plaintiff would have to show "that but for the dishonesty, the challenged action would not have occurred." But Ramirez says no such thing. To the contrary, *Ramirez* addresses a police officer's motion for summary judgment based upon the affirmative defense, and thus necessarily involves only *what the officer must prove* in order to justify such relief.

Significantly, what *Ramirez* ultimately concludes is that a police officer who knowingly falsified evidence in support of a search warrant application, in

circumstances where he should have known the evidence was otherwise insufficient to support the warrant, was not entitled to rely upon qualified immunity as a defense. In doing so, the court quoted the rule set forth in *Branch v. Tunnell* (1991) 937 F.2d. 1382, 1387: "'If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, . . . he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost."

Thus, the *Ramirez* decision simply reflects an understanding that the essence of the federal defense of qualified immunity is the *reasonableness,* or "good faith," of the defendant's conduct. The defense is applicable in situations where defendants establish that their actions, even if harmful to plaintiff's constitutional rights, were nonetheless carried out in good faith. As explained by the Supreme Court, "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo* (1980) 446 U.S. 635 [fn. omitted]. Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' *Wood v. Strickland* (1975) 420 U.S. 308, 322. The subjective component refers to 'permissible intentions.' *Ibid.*

Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. . . .' *Ibid.* (Emphasis added.)" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815, fn. omitted.)

In this case, the jury specifically concluded that Vreeken and Dwojak lied, falsified evidence, and suppressed exculpatory evidence – all of which was material to the dependency court's decision to deprive Fogarty-Hardwick of custody – and that they did so with malice. These findings are clearly sufficient to satisfy the Supreme Court's definition of circumstances in which "qualified immunity would *not* be available."

There was no error in the rejection of qualified immunity in this case.

V

The County also claims, in conclusory fashion, that Fogarty-Hardwick failed to demonstrate "that the County had a policy of condoning perjury in reports or testimony." As the County asserts, such a

failure of proof would preclude any finding of liability against the County itself, since "[i]n order to hold a public entity liable, a plaintiff must show that a public official or employee acted pursuant to an official policy and custom." (*Monell v. Department of Social Services* (1978) 436 U.S. 658.) This amounts to a contention that the judgment against the County was unsupported by substantial evidence.

However, in asserting this claim, the County has once again failed to make any effort to satisfy its burden to summarize the evidence on the point, favorable and unfavorable, and show how and why it is insufficient. Indeed, the County supports its attack on the substantial evidence with nothing more than a bare assertion that Fogarty-Hardwick "did not prove or submit evidence to show a municipal policy that condoned or encouraged lying or fabricating evidence." The assertion is then followed by an intriguing acknowledgment that Fogarty-Hardwick "may point to defendants' requests for admission that the social workers acted pursuant to municipal policy or custom" in support of the contention that such policies existed, but then suggests that this discovery should be construed favorably to the County, in accordance with its own *assumptions* employed in responding. But there is not a single citation to the record contained within this argument, which (including a discussion of legal authorities) occupies less than one and a half pages of the County's opening brief.

Under these circumstances, we have no choice but to conclude the County waived its claim of insufficiency of the evidence to support the existence of a policy. But even if we were to consider the issue on the merits, we would almost certainly have to reject it in any event. In accordance with the usual procedures on appeal we simply could not, as the County requests, indulge inferences *in its favor* based upon what it contends were its unspoken assumptions in responding to discovery. We are obligated to indulge all inferences in favor of the judgment.

Assuming, as the County states, it represented in discovery that its social workers (whom the jury concluded had lied and fabricated evidence) "acted pursuant to municipal policy and custom," that admission would be sufficient to sustain the challenged finding.

VI

The County next asserts the trial court erred in granting Fogarty-Hardwick's motion in limine to exclude evidence she "coached or influenced" her children in connection with claims of sexual abuse against their father. The County asserts this motion was based upon the assertion that such evidence was barred by collateral estoppel, and argues the court erred in granting it because the County was neither a party, nor in privity with any party to the prior proceeding relied upon by Fogarty-Hardwick as the basis of the estoppel.

The County correctly states the requirements for application of collateral estoppel. "The doctrine [of collateral estoppel] applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Moreover, we would agree the County was neither a party to, or in privity with, any party to the prior action, which was the marital dissolution action between Fogarty-Hardwick and her former husband.

However, once again the County has crafted an argument without fully acknowledging what *actually occurred* in the trial court below. This time, what the County fails to acknowledge is that collateral estoppel was *not the only basis* for Fogarty-Hardwick's motion to exclude the evidence. She also relied upon a hearsay objection, as well as Evidence Code section 352.[8]

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[8] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will

(Continued on following page)

As previously noted, we are obligated to indulge all presumptions in favor of the court's ruling. As a consequence, where the record does not establish the reasoning employed by the court in reaching its decision, we must presume the court based its ruling on whatever argument asserted best supports it.[9] Hence, in order to persuade us the trial court erred in excluding the evidence, the County was required to demonstrate why none of the arguments relied upon by Fogarty-Hardwick was sufficient to support that decision. Because it made no attempt to do so in its opening brief, we presume the ruling was correct.[10]

VII

The County's last attack on the judgment is based on the assertion the, jury's award of damages was excessive, and reflected a disguised award of

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(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[9] There is nothing in the record before us establishing the court actually relied upon the collateral estoppel theory in its ruling.

[10] The County concedes in its reply brief that Fogarty-Hardwick's motion was grounded on multiple legal arguments. It then argues, for the first time, that (1) the hearsay objection had no merit, and (2) the evidence it sought to rely upon was "not cumulative." The County cannot make these assertions of legal error, for the first time, in a reply brief. But even if we were to consider the points, we would conclude the argument comes up short.

punitive damages against a governmental entity. In its brief, the County simply pointed to the total compensatory damages assessed against all of the defendants, characterized that total as unusually high and disproportionate to Fogarty-Hardwick's alleged damages,[11] and suggested we infer from the "sheer size" of the award "that the jury acted in a punitive fashion."

However, we found that assertion unpersuasive,[12] and found ourselves more troubled by the significant disparities *among* the damage amounts awarded in

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[11] The disproportionate argument concocted by the County is simply untrue and misleading. The County purported to compare a relatively small *portion* of the economic damages claimed by Fogarty-Hardwick (her medical expenses), against, the entire award – including the entirety of both economic and non-economic damages – made by the jury. But Fogarty-Hardwick's economic damages also included the significant legal expenses she had incurred during the years-long custody fight she was forced to wage after she was improperly deprived of custody in the dependency case. In fact, the total amount of *economic* damages alleged by Fogarty-Hardwick at trial (including both medical and legal expenses) actually exceeded the amount of *economic* damages awarded to her by the jury. In addition to those economic damages, Fogarty-Hardwick also sought compensation for her significant emotional distress, and it was the jury's award of those *non-economic* damages which accounts for the bulk of the overall liability assessed.

[12] Indeed, at oral argument, the County's attorney expressly conceded that $5 million was *not* an unreasonable amount of damages to compensate for the loss of one's children for a period of several years and the concomitant breakage suffered in those relationships.

the various special verdicts relating to each defendant, and by the fact those special verdicts seem to hold each defendant *separately liable* for those different damage awards. To reiterate, the damage amounts contained in the special verdicts against each defendant include two *separate* awards of $2,260,785 in damages against the County (as compared to only $117,000 against Vreeken herself, and $274,000 against Dwojak, Vreeken's supervisor), and those awards add up to the "total" amount of damages the jury determined Fogarty-Hardwick had suffered. There is no overlap in the numbers, and no joint liability imposed for any damages. While the overall amount of the judgment was not a concern, these disparities did seem to raise the specter of a "punishment" levied against the County for the actions of its employees.

Consequently, we ordered the parties to provide us with supplemental briefing to address the following issues:

(1) What evidence in this case, or legal authority, supports the jury's conclusion that the damages suffered by Fogarty-Hardwick in this case were divisible, or that a distinct portion of her damages was caused by each defendant and not the others?

(2) What evidence in this case, or legal authority, supports the jury's conclusion that the County of Orange caused Fogarty-Hardwick to suffer a greater amount of damage than did Vreeken and/or Dwojak themselves?

(3) What evidence in this case would support the conclusion that the "official policies and customs" of the County of Orange, and/or its failure to train or supervise its employees, caused harm to Fogarty-Hardwick which was distinct and separate than the harm caused by the misconduct of Vreeken and Dwojak?

(4) What evidence in this case, or legal authority, supports the jury's conclusion that the "official policies and customs" of the County of Orange caused Fogarty-Hardwick to suffer different damages than those caused by its failure to train or supervise its employees?

In response to each of these questions, the County gave new definition to the word "laconic" – merely stating in conclusory fashion that it is unaware of any legal authority or any evidence which would support the distinct damage awards made by the jury in this case, while making no effort to argue its position or to explain why such distinctions might undermine the validity of the compensatory verdicts.

Fogarty-Hardwick, by contrast, made a significant effort to explain why the damage awards in the special verdicts should be upheld. Among other things, Fogarty-Hardwick suggested she suffered "a series of independently compensable injuries" over the course of the events underlying this case.

Fogarty-Hardwick also asserted that the separate damage awards can be appropriately viewed as an "apportionment of fault" among the defendants,

and argued the jury could have reasonably concluded the County – which both promulgated the misguided policies which gave rise to the misconduct alleged in this case and failed to adequately supervise its employees – had substantially more responsibility for the effects of that misconduct than did the social workers themselves. Fogarty-Hardwick asserts "the jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility," citing *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.)

Fogarty-Hardwick concedes that no apportionment of fault was requested in this case, but argues that the damage amounts assessed against each defendant – which add up to the total amount of damages which the jury expressly found had been inflicted on Fogarty-Hardwick – demonstrate that the jury actually engaged in the apportionment on its own initiative. She further contends that because the legally appropriate outcome would have been to hold all defendants liable, jointly and severally, for the *entire* $4,912,866 compensatory award, defendants were not harmed by the apportionment, and we should thus uphold the verdicts as rendered.

We agree. In *Jackson,* the court first noted that "[w]hen a plaintiff has suffered a single or indivisible injury, the general rule is that 'each tortfeasor is jointly and severally liable for the entire amount of damages.' [Citation.]" (*Jackson v. City of St. Louis* (8th Cir. 2008) 220 F.3d 894, 897.) There is nothing in this case to suggest that a deviation from that

general rule would be appropriate. As all parties conceded at oral argument, the County inflicted harm on Fogarty-Hardwick only through the actions of its employees, the social workers. Because those social workers acted pursuant to the policies put in place by the County, it was proper to hold the County directly liable for the damages caused by their actions – but the measure of those damages was *the same* for both employees and employer. And since the jury explicitly found that the overall amount of those damages was $4,912,866, it would have been appropriate to hold all defendants liable, jointly and severally, for that amount.

The fact the jury apportioned Fogarty-Hardwick's damages among the several defendants, rather than holding each liable for the entire amount, might theoretically be harmful to Fogarty-Hardwick (who is not complaining), but we cannot see how it harmed defendants. And indeed, in its response to Fogarty-Hardwick's supplemental brief on the point, the County makes no assertion it was harmed by apportionment. We consequently affirm the damage awards as stated in the judgment.

VIII

And finally, the County attacks the court's award of $1.6 million in attorney fees, arguing the court erroneously double-counted the complexity of the case when it relied upon that factor both as a basis for assigning a lodestar amount, and as a basis

for applying a multiplier of 2.5 to that amount. The County contends that as a result of this error, we should remand the case to the trial court, "for a proper determination of attorneys' fees."

The contention is supported by a single case citation, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, in which our Supreme Court is quoted as stating "the difficulty of the question involved [is] *usually* already encompassed by the lodestar." Unfortunately, we cannot locate that quote within *Ketchum*.

And other than that somewhat equivocal (and apparently nonexistent) quotation, the County offers no discussion or analysis of the rule it seeks to invoke, either as applied in *Ketchum* or in any subsequent case; nor does it engage in any meaningful analysis of the court's ruling in this case. Thus, the County has completely failed to demonstrate why this case would necessarily run afoul of *Ketchum*. The issue is waived.

IX

The final issue in this case is one we raised on our own motion, and on which we requested the parties provide supplemental briefing. As part of the judgment, the court granted injunctive relief which "permanently" restrains the County, SSA and their employees from (1) "including allegations in a juvenile dependency petition under [Welfare and Institutions Code section] 300 against any parent or guardian of a child without some reasonable and

aticulable [*sic*] evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian,* or is in imminent danger of abuse, neglect or abandonment by that parent"; and (2) "requiring a parent or guardian of a child to sign its 'Agency-Parent Temporary Agreement' or releases of confidential information (e.g., medical, psychological[,] psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent."

We requested the parties address the propriety of this injunctive relief, with particular attention to: "(1) whether the injunctive relief imposes obligations on SSA which are actually or potentially inconsistent with those imposed on it by statute; (2) whether and to what extent the trial court in this case has jurisdiction to control the future conduct of SSA in dependency matters filed in the juvenile court; and (3) whether the injunctive relief granted in this case is, as a practical matter, enforceable."

The County responded with a spirited attack on the injunctive relief, arguing it was fatally inconsistent with statutory requirements; the court lacked jurisdiction to impose it; and the order was unenforceable. These assertions are not unexpected; what is surprising is that the County didn't make any of them in its opening brief.

Fogarty-Hardwick defends the injunctive relief as a necessary and appropriate response to the evidence adduced in this case, and argues it represents a proper exercise of the trial court's discretion. We conclude the injunctive relief must be stricken from the judgment.

As Fogarty-Hardwick herself asserts, SSA has only the powers conferred on it by statute, and must comply with the provisions of the Welfare and Institutions Code in its handling of dependency cases. And while a court might properly restrain SSA from acting in a manner which exceeds or is inconsistent with its statutory mandate, it cannot order SSA to do anything which is *different* from that mandate.

In this case, the first injunctive order states SSA is prohibited from including in a dependency petition any "allegations . . . against any parent or guardian of a child without some . . . reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian,* or is in imminent danger of abuse, neglect or abandonment by that parent." Although the language is not a model of clarity, we presume it is intended to prohibit SSA from making jurisdictional allegations against parents like Fogarty-Hardwick, who the initial dependency petition alleged had "failed to protect" her child from sexual abuse by Fogarty-Hardwick's former husband, but who was not alleged to have personally "abused, neglected or abandoned" the child.

However, such a blanket prohibition is inconsistent with the statute governing dependency jurisdiction. Welfare and Institutions Code section 300 specifies the circumstances under which a child may be declared a dependent child, and those circumstances include where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the *failure or inability* of his or her parent or guardian to adequately *supervise or protect* the child *or* the *willful or negligent failure* of the child's parent or guardian to *adequately supervise or protect* the child from the conduct of the custodian with whom the child has been left. . . ." (Welf. & Inst. Code, § 300, subd. (b), italics added.)

Under this provision, it is clear that a parent's mere "failure or inability" to "adequately supervise or protect" the child is distinguished from the parent's "willful or negligent" failure to do so, and that the Legislature intended *either* circumstance would be a sufficient basis for imposing dependency jurisdiction. Were we to allow the first injunctive order in this case to stand, it would impermissibly restrict SSA's ability to rely upon the mere "failure or inability" of a parent (absent any negligence) to protect the child from being harmed by others. We cannot do that. To the extent the statutory standard is considered to be overly broad or too insubstantial a basis for imposing dependency jurisdiction, that complaint is properly directed to the Legislature, and is not a proper subject of injunctive relief.

As for the second injunctive order issued in this case prohibiting SSA from "requiring" a parent or guardian to sign an "Agency-Parent Temporary Agreement" for the release of confidential information absent a "reasonable suspicion" that the parent in question has "abused, neglected or abandoned the child" – the same considerations pertain. As the County points out, Welfare and Institutions Code section 16010, subdivision (f), specifically requires the court, at the initial hearing, to direct "each parent to provide to the child protective agency complete medical, dental, mental health, and educational information, and medical background, of the child *and of the child's mother and the child's biological father if known.*" (Italics added.) The statute imposes this requirement without regard to the perceived culpability of the parent in question. Thus, we cannot uphold an injunctive order which prohibits SSA from requiring parents to sign releases for such mandatory information in cases where it lacks "reasonable suspicion" that the parent has personally "abused, neglected or abandoned the child."

The injunctive orders are also problematic on jurisdictional and enforcement grounds, as well. By their terms, the orders purport to control the conduct of SSA in *future cases* pending before the *dependency* court. As the County points out, once the dependency court establishes jurisdiction over a particular child, "all issues regarding his or her custody shall be heard *by the juvenile court.*" (Welf. & Inst. Code, § 304, italics added.) Thus, there are inherent jurisdictional

complications presented when an ordinary civil court, exercising its jurisdiction in a tort case, purports to impose blanket restrictions on the manner in which *all future dependency cases* can be handled. Moreover, it appears that enforcement of these orders would be impossible. The future conduct to be enjoined will not, and cannot, be monitored by Fogarty-Hardwick, nor can it otherwise be routinely supervised by the court which issued this order, because juvenile dependency matters are required to be kept confidential. (Welf. & Inst. Code, § 827.)[13]

And while Fogarty-Hardwick seeks to characterize the injunctive relief issued in this case as merely a means of assisting SSA in "promulgat[ing] written policies" and "provid[ing] training" on these issues, that is not what the injunctive orders provide. They explicitly impose restrictions on the conduct of SSA in future dependency court cases. That goes far beyond the mere facilitation of internal policymaking or training. The injunctive relief provisions of the judgment are consequently stricken.

However, our decision to strike the injunctive relief from the judgment should not be viewed by the

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[13] Welfare and Institutions Code section 827, subdivision (a)(1)(L) allows a juvenile case file to be inspected by "A judge, commissioner, or other hearing officer assigned to a family law case with issues concerning custody or visitation, or both, involving the minor," but does not permit any other judicial officer to have access, merely because he purported to issue an injunction which permanently affects all juvenile cases.

County as a sign we view it as insignificant. Quite the contrary is true. The fact that a very well respected member of the superior court bench viewed the issuance of injunctive relief as necessary here highlights the egregiousness of defendants' conduct in this case. Stated plainly, the outcome of this case cannot be dismissed as merely the unfortunate product of a runaway jury. The evidence adduced at trial obviously caused both the jury *and the judge* to conclude not only that something seriously wrong was done to Fogarty-Hardwick in this case, but also that the wrongful conduct was *not an isolated incident*. That conclusion is something the County should be taking *very* seriously.

The judgment is reversed and the case is remanded to the trial court with directions to strike the injunctive relief from the judgment. In all other respects, the judgment is affirmed. Fogarty-Hardwick is to recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE, CIVIL COMPLEX CENTER

DEANNA FOGARTY-HARDWICK Plaintiffs, v. COUNTY OF ORANGE, MARCIA VREEKEN, ELAINE WILKINS AND HELEN DWOJAK, Defendants.	Case No. 01CC02379 (Case Assigned to Hon. Ronald L. Bauer, Dept. CX103) ~~[PROPOSED]~~ JUDGMENT (Filed May 16, 2007)

This action came on regularly for trial before the jury, with the Court sitting in equity as to Plaintiff's Fourth Cause of Action seeking an injunction, on February 13, 2007 in Department CX103 of the above entitled Court, the honorable Ronald L. Bauer, Judge presiding. Plaintiff Deanna R. Fogarty-Hardwick appeared in person and was represented by and through her counsel of record Shawn A. McMillan, Esq. and Sondra S. Sutherland, Esq. Defendants County of Orange, Marcia Vreeken, Elaine Wilkins, and Helen Dwojak appeared and were represented by Glen Stebens with the law firm of Byron, Beam, Brobeck, Borges, and Rosa, LLP.

A jury of twelve persons was impaneled and sworn to try case. Witnesses were sworn and testified.

After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the case was submitted to the jury with directions to return their verdict on the matters submitted. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was filed with the clerk and entered upon the minutes. True and correct copies of the jury's verdicts are attached hereto as Exhibit A, and are incorporated herein by this reference.

It appearing that by reason of said special verdict: Plaintiff Deanna R. Fogarty-Hardwick is entitled to judgment against defendant The County of Orange in the amount of $4,521,570.00, with interest to accrue thereon as allowed by law; Deanna R. Fogarty-Hardwick is entitled to judgment against defendant Marcia Vreeken in the amount of $119,186.00, which amount includes the jury's award of punitive damages, with interest to accrue thereon as allowed by law; and Deanna R. Fogarty-Hardwick is entitled to judgment against Helen Dwojak in the amount of $278,100.00, which amount includes the jury's award of punitive damages, with interest to accrue thereon as allowed by law.

Defendant Elaine Wilkins is entitled to judgment that plaintiff take nothing from her.

Subsequent to the Jury's return of its verdict, the Court held a further hearing on May 14, 2007, as to

Plaintiff's Fourth Cause of Action for injunctive relief. Shawn A. McMillan, Esq. appeared and argued on behalf of Plaintiff Deanna Fogarty-Hardwick who was also present in court, and Glen Stebens appeared and argued on behalf of defendant County of Orange. The Court having considered all evidence and argument presented finds that all statutory predicates to the exercise of its equitable powers have been met, and that Plaintiff has met her burden of proof in relation to her Fourth Cause of Action seeking injunctive relief. Accordingly, the Court entered an injunction against the County of Orange Social Services Agency, a true and correct copy of which is attached hereto as Exhibit B and is incorporated herein in its entirety by this reference.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That, in accordance with the jury's verdicts, plaintiff Deanna R. Fogarty-Hardwick have judgment against defendant The County of Orange for the sum of $4,521,570.00 with interest thereon at the maximum rate allowed by law; That plaintiff Deanna R. Fogarty-Hardwick have judgment against defendant Marcia Vreeken for the sum of $119,186.00 with interest thereon at the rate of ten percent per annum; That plaintiff Deanna R. Fogarty-Hardwick have judgment against defendant Helen Dwojak for the sum of $278,100.00 with interest thereon at the rate of ten percent per annum;

That defendant Elaine Wilkins shall have judgment against Deanna Fogarty-Hardwick, who shall take nothing from defendant Elaine Wilkins.

IT IS FURTHER ORDERED that Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are hereby permanently enjoined and restrained from including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and articulable evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent.

IT IS FURTHER ORDERED that Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are hereby permanently enjoined and restrained from requiring a parent or guardian of a child to sign its "Agency-Parent Temporary Agreement" or releases of confidential information (e.g., medical, psychological psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent.

The Court reserves jurisdiction to modify or dissolve the injunction as may be required by the interest of justice.

Deanna Fogarty-Hardwick shall recover her costs of suit including reasonable attorney's fees as allowed pursuant to 42 U.S.C. §1988. The Court retains jurisdiction to determine such amounts. Plaintiff is to file her memorandum of costs within the time prescribed by statute. The issue of prevailing party attorney's fees shall be determined by noticed motion.

APPROVED AS TO FORM:

_____
Glen Stebens, Esq.
Counsel for all Defendants Date:

_____ Date:
Robert M. Dato, Esq.
Counsel for Defendants

/s/ Shawn McMillan
Shawn A. McMillan, Esq. Date: 05-14-07
Counsel for Plaintiff

IT IS SO ORDERED /s/ Ronald Bauer
Ronald L. Bauer,
Judge of the
Superior Court

Date: 16 May 2007

EXHIBIT A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #1** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Marcie Vreeken intentionally violate the plaintiff's right to familial association or right of privacy?

__10__ Yes __2__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Marcie Vreeken violate plaintiff's right of familial association or right of privacy while acting or

purporting to act in the performance of her official duties?

__10__ Yes __2__ No

3. Was Marie Vreeken's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

__9__ Yes __3__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $12,344

b. Future economic loss: $1,092

c. Past noneconomic loss: $69,300

d. Future non-economic loss: $34,650

TOTAL $117,386

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #2** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Elaine Wilkins intentionally violate the plaintiff's right to familial association or right of privacy?

__2__ Yes __10__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Elaine Wilkins violate plaintiff's right of familial association or right of privacy while acting or

purporting to act in the performance of her official duties?

____ Yes ____ No

3. Was Elaine Wilkin's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $_____

b. Future economic loss: $_____

c. Past noneconomic loss: $_____

d. Future non-economic loss: $_____

TOTAL $_____

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007
(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #3** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Helen Dwojak intentionally violate the plaintiff's right to familial association or right of privacy?

__10__ Yes __2__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Helen Dwojak violate plaintiff's right of familial association or right of privacy while acting or

purporting to act in the performance of her official duties?

__10__ Yes __2__ No

3. Was Helen Dwojak's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

__10__ Yes __2__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $28,802

b. Future economic loss: $2,548

c. Past noneconomic loss: $161,700

d. Future non-economic loss: $80,850

TOTAL $273,900

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #4** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Marcie Vreeken's, Elaine Wilkins' or Helen Dwojak's conduct violate plaintiff's right of familial association for right of privacy?

__10__ Yes __2__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the conduct of Marcie Vreeken, Elaine Wilkins or Helen Dwojak occur as a result of the official policy or custom of the County of Orange?

__11__ Yes __1__ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was Marcie Vreeken's, Elaine Wilkins' or Helen Dwojak's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

__10__ Yes __2__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $185,155

b. Future economic loss: $16,380

c. Past noneconomic loss: ~~$1,039,500~~ 1,289,500

d. Future non-economic loss: ~~$519,750~~ 769,750

TOTAL ~~$1,760,785~~ 2,260,785

Signed: /s/ Barbara Hodgan Dated: March 23, 2007
Presiding Juror

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #5** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Was County of Orange's training or supervision inadequate to train and/or supervise its employees to properly handle usual and recurring situations?

10 Yes 2 No

2. Was County of Orange deliberately indifferent to the need to train and/or supervise its employees adequately?

10 Yes 2 No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no

further questions, and have the presiding juror sign and date this form.

3. Was failure to provide proper training and/or supervision the cause of the deprivation of Deanna Fogarty-Hardwick's right of familial association?

__10__ Yes __2__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was County of Orange's failure to adequately train and/or supervise its employees a substantial factor in causing harm to plaintiff?

__10__ Yes __2__ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $185,155

b. Future economic loss: $16,380

c. Past noneconomic loss: ~~$1,039,500~~ 1,289,500

d. Future non-economic loss: ~~$519,750~~ 769,750

TOTAL ~~$1,760,785~~ 2,260,785

Signed: /s/ Barbara Hodgan Dated: March 23, 2007
Presiding Juror

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #6** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

Regardless of the award of damages in verdict form numbers 1-5 what are the total damages suffered by plaintiff Deanna Fogarty-Hardwick in each of these categories?

a. Past economic loss: $411,456

b. Future economic loss: $36,400

c. Past noneconomic loss: $2,810,000

d. Future non-economic loss: $1,655,010

Signed: /s/ Barbara Hodgan Dated: March 23, 2007
Presiding Juror

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **SPECIAL VERDICT RE: MALICE OPPRESSION OR FRAUD** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Marcie Vreeken act with malice, oppression or fraud?

9 Yes 3 No

2. Did Elaine Wilkins act with malice, oppression or fraud?

__1__ Yes __11__ No

3. Did Helen Dwojak act with malice, oppression or fraud?

__9__ Yes __3__ No

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiffs, v. COUNTY OF ORANGE, Defendants.	CASE NO. 01CC02379 **VERDICT FORM RE: PUNITIVE DAMAGES** (Filed Mar. 27, 2007)

1. As to defendant Marcie Vreeken, what amount of punitive damages do you award?

$1,800.00

2. As to defendant Helen Dwojak, what amount of punitive damages do you award?

$4,200.00

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 27, 2007

When signed, this verdict form must be delivered to the bailiff.

EXHIBIT B

Sondra S. Sutherland, Esq. (CSB #185374)
LAW OFFICES OF SONDRA S. SUTHERLAND
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Attorneys for Plaintiff,
DEANNA R. FOGARTY-HARDWICK

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
CIVIL COMPLEX CENTER

DEANNA FOGARTY-HARDWICK & ROES 1-5,	)	Case No. 01CC02379 (Case Assigned to Hon. Ronald L. Bauer, Dept. CX103)
Plaintiffs,	)	Date Action Filed : 2/15/01

v.	)	Trial Date : 2/13/07
COUNTY OF ORANGE, et al.,	)	**PERMANENT INJUNCTION**
Defendants.	)	(Filed May 14, 2007)

The court, having considered Plaintiff's request for a permanent injunction, came on for trial in the above-captioned court commencing February 13, 2007. Sondra S. Sutherland, Esq. and Shawn A. McMillan, Esq. appeared on behalf of Plaintiff, Deanna R. Fogarty-Hardwick, and Glen A. Stebens, Esq. appeared on behalf of Defendants, County of Orange Social Services Agency, Marcie Vreeken, Helen Dwojak and Elaine Wilkins. Satisfactory evidence having been presented.

IT IS ORDERED THAT Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are enjoined and restrained from including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and articulable evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent.

IT IS FURTHER ORDERED THAT Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are enjoined and restrained from requiring a parent

or guardian of a child to sign its "Agency-Parent Temporary Agreement" or releases of confidential records or information (e.g., medical, psychological, psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent.

The Court reserves jurisdiction to modify or dissolve the injunction as may be required by the interests of justice.

Dated: 14 May 2007 /s/ Ronald L. Bauer
Hon. Ronald L. Bauer, Judge
Orange County Superior Court

WALTER D. POSEY
Commissioner of the Superior Court
Department 402
341 South The City Drive,
Orange, California, 92613-6000

Telephone: 935-7923

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

In re the marriage of:	)	CASE NO.
PETITIONER:	)	95 D- 00 48 98
DEANNA HARDWICK	)	ORDER AFTER
	)	HEARING ORDER
AND	)	TO SHOW CAUSE:
RESPONDENT:	)	(Filed Dec. 31, 2001)
CARY HARDWICK	)	

The Court bifurcated the above matter as to custody and visitation from other issues involved in the dissolution of marriage. The Court heard evidence, reviewed expert reports, read the declarations of both parties, their attorneys and the attorney for the minor children, and reviewed all of the exhibits that were received in the litigation of this action.

The court took the above matter under submission on September 18th, 2001 and rules as contained herein. The issues before the court at this time are custody of the two children; time share of the minor children; legal custody of the children; child support, child care and attorney fees for both parties.

CHILD CUSTODY:

> The issue of greatest import for this court is the question of custody. It is clear that the California legislature has given direction to the trial courts in California Family Law Code §3020(b) which states:
>
> "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interests of the child. . . ."

This court must make the order which best serves this public purpose, however, clearly, the entire scheme underlying custody decrees is that primary consideration must be given to the welfare of the children. In this case these parents have been unable to work together to resolve the issues of the time that the children should have with each parent, Each of them now present themselves to the court indicating that they are good parents. This court defines a "good parent" as one who can meet the various needs of the children involved by thinking of the children first and following the law.

Effective January 1st 1998 the above statute was amended to add that when the court is determining

the child's best interest its main concern should be the health, safety, and welfare of the child concerned.

Family Code 3040(a) directs the court to grant custody in the following order of preference according to the best interests of the children:

> "(1) To both parents jointly or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the non-custodial parent, consistent with Section 3011 and 3020, and shall not prefer a parent as custodian because of that parent's sex."

Family Code Section 3040(b) allows the court the widest discretion to choose a parenting plan that is in the best interest of the children.

This court desires to follow the law, and seeks the key area to rely upon in making the decision. This court wants to follow what is clearly the law of California (in having a frequent and continuing contact) but must chose to do so by looking to the best interests of the children involved in the specific situation.

In making the determination which has to be made, this court has attempted to hear all evidence presented, read all of the expert reports for both parties, observe the witnesses, their demeanor, attitude, candor, and lack of candor.

See: *Board of Education vs. Jack M* (1977) 19 Cal.3d 697.

As to the minor children in this case; to wit: Kendall Hardwick DOB: 9-19-1990; age 11 years and Preslie Hardwick DOB: 9-9-1993; age 8 years, it is ordered that legal and physical custody be granted to the Respondent, father. The primary residence of both children shall be that of the respondent, father, subject to the following:

Major decisions regarding health, education, schooling and religion shall be made by the Respondent, father. He shall pick the children's pediatrician. Emergency care may be provided by either parent as needed with notice to the other parent within two hours of the care being provided.

The Petitioner, mother's, physical custodial periods shall be as follows:

1. Alternate weekends from Friday at 3:00 PM or immediately after school until 6 P.M. on Sunday evening. During the school year on the Friday of the mother's weekends if there is no school the exchange time will not change. If school lets out early for any reason the time shall not change. If a school function causes a child to not be available at the pick-up time then the pick-up time will occur immediately after the school event is over. The teachers are to be provided a schedule of the exchange times so that they will be aware who is responsible for pick-up of the children from school. Mother shall assist with school home work during her weekends with the children.

This court is intentionally not granting visitation during the week for the mother at this time. The alternate week ends shall start the first week end in January 2002. Each week end shall start on a Friday.

2. Unspecified three day holidays and special days shall be spent with the parent having regularly scheduled contact, in accordance with exchange hours and locations previously delineated.

3. Whenever possible, exchanges shall occur at a school site or child care provider with pick-up and return occurring at the hours designated by the academic environment. When school is not in session and there is no designated place for the exchange, the exchange shall be at a neutral public site or shall be provided by a neutral third party. If the parties can not agree the organization FACES shall be used for the exchanges that do not take place at school. If FACES is not available the local police department of the city where the father resides shall be used.

4. Holidays supersede the regular contact schedule and are as following:

   A. Thanksgiving Holiday Weekend: The holiday shall begin immediately after the school day ends on the Wednesday immediately preceding Thanksgiving Day until the children are returned to school the following Monday morning. Even numbered years with the mother and odd numbered years with the father.

B. Christmas Holiday: In the following years this holiday shall be divided equally between the parents. The first one half in odd numbered years to Father until 11 AM on the 25th and the second one half to mother in odd numbered years and to alternate thereafter.

C. Easter Holiday: The Easter Holiday shall be alternated between the parents beginning on the Friday before Easter Sunday until the Monday morning following Easter Sunday. Even numbered years the holiday shall be spent with the mother; Odd numbered years with the father.

D. Father's Day/Mother's Day: Spent with each gender specific parent from 10:00 a.m. Sunday to 6:00 PM on Sunday.

E. Legal and School Holidays: The ones that are contiguous with a weekend and not specified in the holiday plan shall be spent with the parent having the scheduled weekend contact. The time spent shall begin the day and hour school ends with a return to school the morning that school resumes.

F. Children's Birthdays: The children will be with the father in all even numbered years and with mother in all odd numbered years. None of this time is to interfere with the schooling of the children. Time for birthdays will be after school to 8:00 p m if on a school day.

G. Summer Vacation: Each parent shall have the option to schedule a vacation for up to fourteen consecutive days during their designated summer period. When vacationing outside of Orange County, they shall notify the other parent of their vacation plans, in writing by May 1st of each year. Prior to the vacation the parents shall also provide information regarding the destination, dates of arrival and departure, mode of transportation and emergency contact telephone numbers. During said vacations regularly scheduled weekend and mid-week contact shall not occur for the other parent.

H. No summer vacation shall be planned less that one (1) week prior to the start of school. The is to allow the children time to prepare for the start of school and get back onto a school schedule.

I. In the event of a conflict, the mother's vacation plans shall have priority during the even numbered years and father shall have priority in odd numbered years, so long as both notify the other by May 1st of the year.

J. The parents may by "mutual agreement" plan vacations longer than two weeks so long as the agreement is in writing and is signed by both parties prior to May 1st of the year involved.

K. The children shall continue in therapy. They are to be seen on at least a bi-weekly basis. It is preferable that the parents shall alternate taking the children to their therapy sessions.

Should either parent be unable to or declines to take the children for an appointment the other parent may take the children. The schedule shall be as set by the Doctor.

L. Both parents shall enroll in counseling for assistance is developing more appropriate communication skills and constructive problem solving techniques.

SPECIAL ORDERS AND FINDINGS:

1. The foregoing visitation order is intended by the court to allow the minor children to have quality time with each parent.

2. Each parent may have telephone contact with the children between the hours of 4 PM and 6 PM on Monday, Wednesday and Friday of each week while they are with the other parent unless other arrangements have been made between the parents. The children may be allowed to call either parent during the above stated times.

3. Father shall advise the Mother of the children's participation in any school-related or other structured activities. This court encourages both parents to be involved in their activities and to show support for them at all times.

4. Each parent shall have access to school records at all times no matter which parent placed the child into school. Both parents shall be named on the enrollment card at the school for any emergency. All of their records shall bear the name of "Hardwick".

5. The Respondent, Father, shall have the sole duty and responsibility to select the doctor that is treating the minor children and he shall advise the mother of the medication type and amount to be given the children. The advisement shall be in writing and the Petitioner, Mother, is ordered to follow the instructions exactly. If the Mother disagrees as to the need or amount of medication she is to obtain her own examination and file a new and different Order to Show Cause so that a Judge of the Superior Court may take evidence as between the doctors selected by the parties.

6. If either party wishes to modify this order, that person is to make an appointment with meditation and advise the other in writing of the date and time of the interview. Both parties are ordered to attend and to "in good faith" attempt to arrive at an agreement that is "in the best interest of both children" prior to filing any order to show cause to modify this order.

7. Mother is ordered not to file any action for change of these orders without first consulting with minor's attorney Ms. Sharon Grier. The attorney for the children shall remain as their attorney until relieved by the court and may at any time apply to the court "ex parte" for orders to protect the minor children.

7. Each parent shall carefully avoid the scheduling or arranging of any activities for the children which are likely to conflict with any visitation or period of custody allocated to the other parent. Each party is restrained from enrolling either of the children in any activity which would conflict

with the parental sharing plan stated herein, unless they have the explicit written agreement of the other parent.

8. Should either of the children suffer any type of injury and/or any other type of health infirmity during a period of time in which either party cannot be reached by any health care provider which is caring for the child of the marriage then either party shall be deemed legal guardian for the purpose of rendering aid.

9. Each parent shall keep the other advised at all times of his and her current residence address; telephone numbers (both home and work) and the child's school and also the location of any place where the child may be spending any extended time period in excess of one week.

10. Neither parent shall use any such information for the purpose of harassing nor annoying the other in any way and each party is hereby specifically restrained and enjoined from disturbing the peace of the other or invading the other's privacy.

11. Neither party may move either of the children from the state of California without first giving the other party written notice as required by California Family Code §3024. California is found to be the home state of the children at this time.

12. Each party is restrained from attempting to turn either of the children against either the mother or the father by discussing their shortcomings or from allowing any third party to do so in their presence.

13. The parties shall not attempt to buy the children's favor by presents or by special treatment or allow any third party to do so.

14. Neither party shall swear at, curse at, verbally demean, nor otherwise subject either of the children to verbal abuse.

15. Neither party shall knowingly allow them to be subjected to corporal punishment nor subjected to verbal abuse by any third person.

16. Neither parent shall use or make, nor allow any other person to use or make any disparaging or derogatory remarks to or about the other parent in the children's presence.

17. This Court is intentionally omitting any order for the "right of first refusal" in the shared time with the minor children. This Court finds that the stability of the children at this time is the most important item. They need to know which parent they are going to be with from day to day and week to week. Pressure has been placed upon them to make decisions that children should not have to make. Any action taken by either of the parents to modify this order within the next six (6) months should have the court assigned appoint a special master or a case manager to address the welfare and safety of these children. This is a recommendation and not a court order at this time. This decision shall left to the court assigned at that time.

This court is trying to consider the past, be aware of the present, and make orders for the future of these children that will allow them to

have a relationship with both parents. If the mother is unable or refuses to forget the past this order will not succeed and litigation will continue causing the children to suffer greatly. Kendall wrote what was intended by her to be a short story. This "short story" gave great insight into the problems of this case from the beginning. The "story" went as follows:

> "The Hardship's by Kendall Hardwick"
>
> "There once was two girls named Ashely and Jodi that lived with there dad because a long time ago when Ashely and Jodi were little there mom would tell them lies about there dad. Then when they were nine years old and six years old they told there Dr. Mitchell about what there mom said to them."

It is obvious to this court that the child was trying to share her feelings about her situation. The reference to Dr. Mitchell as "there Dr. Mitchell" is clear. I have included this with the child's wording and spelling to show to all concerned that this child is asking for help and it is the responsibility of the parents to furnish this help without self interest.

ATTORNEY FEES:

The Petitioner, Mother, is a former Miss California. She works part time at the company that is owned by her parents. She deeded her home to her parents and they pay all of her expenses at this time. The following information was revealed during trial

and by the income and expense declaration of the Petitioner, Mother, signed by her on May 25, 2001 and filed the same date with the court:

1. Her monthly expenses are $4,991.00
2. Her parents are paying approximately $5,000.00 of her expenses monthly
3. She claimed to be unemployed (She last worked 11-14-1956)
4. She signed another income and expense declaration on December 20, 2000 that stated she worked for her father's company, California Wholesale, in Los Alamitos, California and had worked there part time since December 1996.It was noted by the court that there are other differences in the two separate declarations. On the first one she stated her expenses were $13,978.92 per month and that all of these were paid by her parents as a loan.
5. Her date of birth is 11-14-1956 (She is 45 years of age)
6. She has 14 years of education with no degrees
7. She drives a new Ford vehicle with a lease payment of $650.00 which she states is also paid by her parents.
8. She is in good health and is physically able to work. She makes a good appearance and has acted in the past as a spokesperson in public relations.

9. She stated that as of May 25, 2001 she had paid $129,212.37 to various attorneys and still owed $67,000.00. (It should be noted that this is one of several reason why this court could not believe that she did not visit with her two girls for almost a year because she stated she could not afford to pay the monitors.) Her answer to my asking her that question was that she was borrowing the money from her parents and could not afford to pay the monitor.

Her parents wishing to keep her as a part time employee and pay her expenses of $5,000.00 per month is acceptable to this court. This court finds that her income is $5,000.00 per month net earnings and earning ability. I'm sure that her parents are fully aware of the value of her services to their company and are paying her what she is entitled to receive.

For attorney fees based upon need and ability each party is ordered to pay their own fees and costs. This Court having reviewed the file and heard the testimony finds that it is fair and just under the relative circumstances of the respective parties that each party pay their own fees under section 2032 of the Family Code.

For attorney fees based upon sanctions and Family Code Section 3027.1 this court finds that the actual reports of suspected child abuse by the father upon the minor child were made by a "required reporting person". It is believed by the Respondent,

Father, that the mother programed the minor child to make the claim. The story, written by the child, referred to above appears to verify this claim. This court finds by a preponderance of evidence that the Petitioner, Mother, placed the child with the reporting party to have the Father investigated for child abuse. The Petitioner believed the information to be true and she used the child to have the investigation started by the juveniles authorities. She took the, child to a licensed mental health professional for suspected sexual abuse, expecting that the provider would make the report.

This court can not find that the actions of the Petitioner, Mother, were with the knowledge that the accusation of child abuse was false at the time the accusation was made. It is clear that she believed it to be true at the time. (and still does) This section requires that the person be acting in bad faith and knowing the claim to be false makes a claim of child abuse. This requirement of the statute is missing in this case.

Each party, is to pay their own attorney fees and costs as of this date owed to their own attorneys. The parties are ordered to each pay one half of the fees for the attorney for the children for any future fees caused by future litigation. The court finds the balance at this time for the attorney, for the children to be $15,000.00. The income of the Father is three times that of the Mother, however he has paid for the 730 evidence code experts and cared for the children for some time without financial support from the

Mother. Each of the parties are ordered to pay one half of the fees for the children's attorney: $7500.00 each. This amount is due and owing at this time and will draw interest at the legal rate until paid.

CHILD SUPPORT:

The Petitioner, Mother, is ordered to pay directly to the Respondent, Father, the sum of four hundred and five dollars ($478.00) per month payable one half on the 1st and one half on the 15th of each month starting November 1st, 2001 and continuing each month thereafter until each child reached the age of majority or 19 years of age if still in high school full time, dies, becomes fully self supporting or further order of court.

Findings for the basis of the child support order are stated on the DissoMaster printout attached hereto and incorporated herein. As stated above the Petitioner, Mother, worked as a law clerk and earned $21.00 per hour. She actually worked more than 40 hours per week but this court is finding her earning ability to be based upon a regular 40 hour week. She left this employment of her own volition due to a "billing conflict". She is healthy, presents well, well educated and has experience as a law clerk. She is qualified to take the California Bar Examination to become an attorney. She has the ability to earn at least the same she was making when she left her last job.

The Respondent, Father, is ordered and directed to maintain the health insurance for the benefit of the children so long as they are minors and are entitled to be covered by his insurance. He will pay the cost of said insurance. Both parents shall co-operate in the presentation of any claims under said insurance and each shall pay one half of the amount not covered by insurance. If either parent has to pay for uncovered health needs for the children the other parent is ordered to reimburse the other parent within 30 days of proof of payment by the paying parent.

Each parent shall maintain child care for the children while the children are in the respective parent's care and physical custody.

FACTUAL FINDINGS:

Dr. Lipsitz was appointed by the Court under authority of Section 730 of the California Evidence Code. His report recommended custody to the Father. Most of the action since his recommendation has been brought by the Petitioner, Mother, in an effort to convince the Court not to follow Dr. Lipsitz's recommendation.

The Petitioner hired Dr. Drozd under authority of Section 733 of the California Evidence Code to evaluate Dr. Lipsitz's work performance and prepare a report. Dr. Drozd was not appointed by the Court. She was hired by the Petitioner, paid by the Petitioner and reported directly to the Petitioner.

Dr. Drozd never examined the Respondent, Father, during her investigation. She never saw the father with the children and she is not able to give any opinion as to which parent is best able to care for the children in this case. Her opinion was concerning the quality of work performed by Dr. Lipsitz. Because of this limitation and her opinion that Dr. Lipsitz did not do a "good" job this court felt that an impartial opinion from another expert would assist the court in its final decision of what was in the best interest of the children. This Court appointed another 730 CEC expert, Dr. Geri Olin, to do an update of all the reports and give the court an opinion of the "present" recommendation of best interest of the children.

Dr. Olin's report was completed and made available to the attorneys, the court and the parties as of April 9th, 2001. Dr. Olin's recommendation was reviewed by this Court.

Dr. Olin's report on page 20 paragraph one (1) stated,

> "Under no circumstances shall any of the information contained in this report be discussed with the children by either parent, nor shall the children be questioned about any of their comments noted in the body of this report".

It came to the court's attention that the Petitioner, Mother, took her copy of the report and discussed with the children the

> statements made by the children to Dr. Olin. This court does not believe that this conduct is in the best interest of the children.
>
> The final declaration of the Petitioner, Mother, contains several direct statements attributed to the minor children. This court can only give these statements the weight that the court feels is due them under the specific circumstances of this case.

It is clear to this Court that the Petitioner, Mother, continues to discuss this case with the children. This Court believes that the children tell each parent what the child thinks the parent wishes to hear so that the respective parent will love the child involved more. (In the mind of the child) The danger is in the act of even discussing the case with the children.

Both parents must place the needs of the children above the pride and personal desires of themselves. Maybe counseling will help them do so.

> PREPARATION OF ORDER:
>
> Attorney for the Respondent, Father, is ordered to prepare the order after hearing and submit same to the court with a proof of service that it was served upon the Petitioner and her attorney of record at that time by mail at the address last on the pleadings.

IT IS SO ORDERED:

DATE: 12-31-2001 /s/ Walter D. Posey
Walter D. Posey:
Commissioner Superior Court

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Respondent, v. COUNTY OF ORANGE et al., Defendants and Appellants.	G039045 Sup. Ct. No. 01CC02379 **ORDER** (Filed Jul. 12, 2010)

The petition for rehearing is DENIED.

BEDSWORTH, J.
BEDSWORTH, ACTING P.J.

WE CONCUR:

O'Leary, J.
O'LEARY, J.

MOORE, J.
MOORE, J.

cc: See attached list

[List Omitted In Printing]

Court of Appeal, Fourth Appellate District, Division Three – No. G039045

S184795

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DEANNA R. FOGARTY-HARDWICK,
Plaintiff and Respondent,

v.

COUNTY OF ORANGE et al.,
Defendants and Appellants.

(Filed Sep. 29, 2010)

The request for judicial notice is granted.
The petition for review is denied.

GEORGE
Chief Justice

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNE FOGARTY-HARDWICK, PLAINTIFF, VS. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK, DEFENDANTS.	NO. 01CC02379

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 16, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:

LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:

BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[310] Q OKAY. GO AHEAD AND DESCRIBE FOR ALL OF US HOW THINGS CHANGED.

A WELL, PRIOR TO THAT, I THINK I'VE MENTIONED THAT I WOULD GO FREELY. I COMPLETELY PUT MYSELF IN THEIR HANDS. RACHEL DAVIS – I TRUSTED HER AND THERE WAS NO REASON NOT TO. AND SHE WAS WONDERFUL.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK, PLAINTIFF, VS. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK, DEFENDANTS.	NO. 01CC02379

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 1, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:

LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:

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OFFICIAL COURT REPORTER

* * *

[1491] MS. SUTHERLAND: CORRECT, YOUR HONOR.

I WILL BEGIN WITH WHAT IS MARKED AS EXHIBIT 229. THESE ARE PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT HELEN DWOJAK.

* * *

[1493] REQUEST NUMBER 15: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE MATTER OF HARDWICK, KENDALL AND PRESLIE, MINORS, SAME CASE NUMBERS.

ADMIT.

NUMBER 16: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE SAME MATTER.

ADMIT.

* * *

[1494] NOW I'M GOING TO TURN TO WHAT'S BEEN MARKED AS EXHIBIT 231. THESE ARE PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT ELAINE WILKINS.

REQUEST NUMBER 11: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

ADMIT.

[1495] REQUEST NUMBER 12: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES IN YOUR HANDLING OF THE HARDWICK MATTER.

ADMIT.

* * *

TURNING NOW TO EXHIBIT 237, PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT MARCIE VREEKEN.

REQUEST NUMBER 13: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

NUMBER 14: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANTS

ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

[1496] RESPONSE: ADMIT.

* * *

FINALLY, TURNING TO EXHIBIT 239, PLAINTIFF'S REQUEST FOR ADMISSIONS DIRECTED TO THE ORANGE COUNTY SOCIAL SERVICES AGENCY ITSELF.

* * *

[1497] REQUEST NUMBER 31: ADMIT THAT DEFENDANT MARCIE VREEKEN WAS AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN HER HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 32 IS THE SAME REQUEST AS TO DEFENDANT ELAINE WILKINS, AND REQUEST NUMBER 34 IS THE SAME AS TO HELEN DWOJAK.

* * *

[1624] THE COURT: ALL RIGHT. JUNE 22ND, 2006, WITH APPARENTLY BOTH MR. MCMILLAN AND MS. SUTHERLAND PRESENT, AS WELL AS MR. STEBENS AND A COURT REPORTER AND THE WITNESS, WHO WILL NOW HEAR THE FIRST QUESTION.

(THE DEPOSITION OF LAWRENCE LEAMAN WAS READ INTO THE RECORD AS FOLLOWS:)

"QUESTION: SO YOU SERVED AS THE DIRECTOR OF THE ORANGE COUNTY SOCIAL SERVICE AGENCY FOR 20 YEARS?

[1625] "ANSWER: YES.

"QUESTION: CAN YOU GIVE ME THE BEGINNING AND ENDING DATES?

"ANSWER: IT WAS – I BELIEVE IT WAS NOVEMBER OF 1981, AND THERE MAY HAVE BEEN A FEW MONTHS THERE WHERE I WAS ACTING DIRECTOR, NOT OFFICIALLY APPOINTED. I'M NOT SURE. AND IT ENDED WHEN I RETIRED IN JANUARY OF 2003.

* * *

"QUESTION: SO YOU WERE THE PERSON WHO IS MOST RESPONSIBLE FOR ADMINISTERING, FOR EXAMPLE, THE CHILD WELFARE SERVICE PROGRAM; CORRECT?

"ANSWER: IN ORANGE COUNTY.

"QUESTION: IS THAT CORRECT?

"ANSWER: YES.

"QUESTION: AND YOU WERE THE PERSON WHO AT THE ORANGE COUNTY SOCIAL SERVICE AGENCY WAS RESPONSIBLE FOR [1626] MAKING SURE

THAT THE POLICIES CONTAINED WITHIN THE RELEVANT PORTION OF THE WELFARE & INSTITUTIONS CODE AND OTHER LAWS APPLICABLE TO CHILD WELFARE SERVICES WERE IMPLEMENTED AND CARRIED OUT IN THE COUNTY?

"ANSWER: TO THE EXTENT I HAD JURISDICTION, YES.

"QUESTION: AND YOU WERE IN FACT THE DIRECTOR OF THE SOCIAL SERVICE AGENCY AS OF FEBRUARY 17, 2000; CORRECT?

"ANSWER: YES.

* * *

[1627] "QUESTION: WHAT RESPONSIBILITY DID YOU HAVE AS OF FEBRUARY 2000 TO ASSURE THAT ADEQUATE TRAINING WAS PROVIDED TO SOCIAL WORKERS IN THE CHILD WELFARE SERVICES DIVISION OF THE SOCIAL SERVICE AGENCY?

"ANSWER: OVERSIGHT RESPONSIBILITY.

"QUESTION: TO YOUR KNOWLEDGE DID ANY – STRIKE THAT.

"DID EITHER MS. VREEKEN, MS. WILKINS, MS. DUMAS, OR MS. DWOJAK DO ANYTHING IN THEIR HANDLING OF THE KENDALL AND PRESLIE HARDWICK MATTER THAT DEPARTED

FROM THE ESTABLISHED POLICIES AND PRACTICES OF ORANGE COUNTY SOCIAL SERVICES AGENCY?

"ANSWER: I DON'T KNOW.

* * *

[1630] "QUESTION: * * * IN THE EVENT THAT ONE OF YOUR SOCIAL WORKERS DISCOVERED SOME FACT THAT WOULD DEMONSTRATE THE INCORRECTNESS OF THE ALLEGATIONS, WOULD THAT BE SOMETHING THAT YOU WOULD HAVE A POLICY WHICH WOULD MANDATE THE DISCLOSURE OF THAT FACT?

"ANSWER: I'M NOT AWARE OF A POLICY, PER SE, BUT IT WOULD BE MY EXPECTATION. IF WE'RE TALKING ABOUT A PRESENTATION TO THE COURT, THAT ALL [1631] DYNAMICS OF THE CASE BE PRESENTED, INCLUDING ANY INFORMATION THAT YOU DESCRIBED, SUCH AS YOU DESCRIBED.

"QUESTION: WHY IS THAT YOUR EXPECTATION?

"ANSWER: BECAUSE IN A COMPLETE INVESTIGATION, YOU PRESENT YOUR COMPLETE FINDINGS TO THE COURT.

"QUESTION: IS IT YOUR UNDERSTANDING YOUR DEPARTMENT HAD A DUTY AND THE SOCIAL WORKERS IN

YOUR DEPARTMENT HAD A DUTY TO DISCLOSE FACTS THAT WOULD DEMONSTRATE THE INNOCENCE OF A PARENT IN A PARTICULAR CASE?

"ANSWER: HANGING MY HAT ON THE WORD "FACTS," YES.

"QUESTION: AND WHY IS THAT?

"ANSWER: IT GOES BACK TO THE PREVIOUS ANSWER, THAT IT WAS MY EXPECTATION THAT THE FINDINGS OF AN INVESTIGATION THAT LED TO A PETITION TO THE COURT OR AN UP-DATE OF A PETITION TO THE COURT WOULD BE SHARED WITH THE COURT.

"QUESTION: DID YOU HAVE A POLICY TO THAT EFFECT?

[1632] "ANSWER: I DID NOT HAVE A WRITTEN POLICY TO THAT EFFECT, BUT IT WAS MY EXPECTATION.

"QUESTION: SO YOU'VE NEVER DIRECTED THAT DR. REILY PROMULGATE ANY WRITTEN POLICY TO THAT EFFECT, CORRECT?

"ANSWER: I DON'T REMEMBER DOING SO, NO."

* * *

[1633] MR. MCMILLAN: YOUR HONOR, WE'LL BE READING FROM THE DEPOSITION OF SUSAN HOLL, I WILL BE PLAYING THE PART OF SUSAN HOLL. AND IT WAS TAKEN ON

SEPTEMBER 15, 2006. PRESENT WERE MYSELF, MR. STEBENS, THE COURT REPORTER, SUSAN HOLL, AND ONE OF MY ASSOCIATES FROM MY OFFICE, I BELIEVE, REBECCA DAVALOS.

(THE DEPOSITION TESTIMONY OF SUSAN HOLL WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1654] "QUESTION: OKAY. GETTING BACK TO SOME OF THE OTHER PRACTICES AND POLICIES THAT THE AGENCY HAS, IS THERE ANYTHING THAT SPEAKS TO, YOU KNOW, THE CONSEQUENCES OF A SOCIAL WORKER NOT PROVIDING ACCURATE, COMPLETE, OR OBJECTIVE INFORMATION TO THE COURT?

"ANSWER: WELL, JUST POLICY THAT THEY – THAT THEY NEED TO BE DOING THAT. AS I SAID BEFORE, THEY WRITE THE REPORT WITH THE PERJURY STATEMENT, THE ANTI-PERJURY STATEMENT, SO –

"QUESTION: SO WHAT ARE THE CONSEQUENCES FOR NOT PROVIDING ACCURATE AND COMPLETE AND OBJECTIVE REPORTS TO THE COURT?

"ANSWER: WELL, THAT'S A VERY GENERAL STATEMENT OR A VERY GENERAL QUESTION. I MEAN, IF SOMEONE WERE TO, [1655] YOU KNOW,

TO KNOWINGLY FABRICATE SOMETHING OR LIE ABOUT SOMETHING, THAT COULD BE GROUNDS FOR – I MEAN, IF THEY'RE – IT SAYS IN HERE, UNDER MALICE – JUST A SECOND.

"QUESTION: WHICH ONE ARE YOU LOOKING AT?

"ANSWER: JUST A SECOND. LET ME FIND IT:

"OKAY. HERE WE GO. I'M SORRY. IT'S CLIENT RIGHTS, AND IT'S NUMBER A-0309, APPROVED JULY 26, 2001.

"ON PAGE TWO IT TALKS ABOUT LAWFUL CONDUCT BY STAFF AND CIVIL LIABILITY, AND IT DEFINES MALICE AS CONDUCT THAT IS INTENDED BY THE SOCIAL WORKER TO CAUSE INJURY TO THE PLAINTIFF OR DESPICABLE CONDUCT THAT IS CARRIED ON WITH A WILLFUL AND CONSCIOUS DISREGARD OF THE RIGHTS OR SAFETY OF OTHERS, WHICH INCLUDE PERJURY, FABRICATION OF EVIDENCE, FAILURE TO DISCLOSE KNOWN EXCULPATORY EVIDENCE, OBTAINING TESTIMONY BY DURESS, FRAUD, OR UNDUE INFLUENCE.

"AND THEN IT GOES ON TO SAY THAT [1656] IMMUNITY OF SOCIAL WORKERS FROM CIVIL LIABILITY IS NOT ABSOLUTE AND INJURY RESULTING FROM ACTS OF OMISSIONS MADE

WHILE – LET ME SEE. I'M SORRY. THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL SERVICE WORKERS – I'M SORRY.

"THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL WORKERS DOES NOT EXTEND TO MALICIOUS ACTS AS DEFINED ABOVE.

"SO, CONSEQUENTLY, IT IS ESSENTIAL THAT ALL STAFF UNDERSTAND THEY MAY BE HELD PERSONALLY AND FINANCIALLY LIABLE FOR SUCH ACTS.

"QUESTION: OKAY. TO YOUR KNOWLEDGE, HAS THE AGENCY EVER DISCIPLINED A WORKER FOR MAKING AN INACCURATE STATEMENT IN A REPORT?

"ANSWER: AN INACCURATE STATEMENT?

"QUESTION: CORRECT. RIGHT.

"ANSWER: NO.

"QUESTION: AND THAT'S IN YOUR ENTIRE 20 YEARS AT THE AGENCY?

"ANSWER: YOU'RE ASKING – YOU [1657] ARE ONLY ASKING ABOUT INACCURATE STATEMENTS?

"QUESTION: CORRECT.

"ANSWER: NO.

"QUESTION: TO YOUR KNOWLEDGE, IN YOUR 20 YEARS AT THE AGENCY – ACTUALLY, MORE THAN 20 YEARS AT THE AGENCY – HAS ANY SOCIAL WORKER THAT YOU KNOW OF EVER BEEN DISCIPLINED FOR SUPPRESSING EXCULPATORY EVIDENCE?

"ANSWER: NOT TO MY KNOWLEDGE.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY – AND IT IS 22 YEARS, RIGHT?

"ANSWER: YES.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY, HAS ANY SOCIAL WORKER OR SOCIAL WORKER'S SUPERVISOR, FOR THAT MATTER, BEEN DISCIPLINED FOR MAKING AN UNTRUTHFUL STATEMENT IN A REPORT?

"ANSWER: NOT TO MY KNOWLEDGE, NO.

"QUESTION: OKAY. AND IN YOUR 22 YEARS AT THE AGENCY, HAS ANY SUPERVISOR, SOCIAL WORKER, OR SUPERVISOR EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR SUPPRESSION OF EXCULPATORY EVIDENCE?

[1658] "ANSWER: WOULD YOU DEFINE WHAT THAT IS?

"QUESTION: WHAT WHAT IS? EXCULPATORY OR SUPPRESSION?

"ANSWER: EXCULPATORY.

"QUESTION: DO YOU UNDERSTAND WHAT EXCULPATORY MEANS?

"ANSWER: NO. THAT'S WHAT I'M ASKING.

"QUESTION: OKAY. LET ME ASK IT THIS WAY: WHAT WOULD YOU REFER TO AS INFORMATION – WHAT WOULD YOU CALL INFORMATION THAT WOULD INDICATE THAT A CLIENT DID NOTHING WRONG OR DID NOTHING THAT WOULD HAVE REQUIRED THE REMOVAL OF THE CHILD FROM THE HOME? WHAT WOULD YOU CALL THAT TYPE OF EVIDENCE?

"ANSWER: IN A CHILD ABUSE REFERRAL, IT WOULD BE CALLED UNFOUNDED.

"QUESTION: UNFOUNDED.

"IN YOUR 22 YEARS OF EXPERIENCE AT THE AGENCY, HAS ANY SUPERVISOR OR SOCIAL WORKER EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR PRESENTING UNFOUNDED EVIDENCE OR MAKING UNFOUNDED ACCUSATIONS?

[1659] "ANSWER: NO.

"QUESTION: HOW ABOUT HAS ANY SOCIAL WORKER IN YOUR 22 YEARS OF EXPERIENCE AT THE AGENCY – HAS ANY SOCIAL WORKER OR SOCIAL

WORKER'S SUPERVISOR EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR HIDING OR KEEPING EVIDENCE AWAY FROM THE COURT THAT WOULD HAVE RESULTED IN REMOVAL OF THE CHILD FROM THE PARENT'S CUSTODY?

"ANSWER: NO, NOT TO MY KNOWLEDGE.

"QUESTION: AND YOU REMEMBER WE TALKED ABOUT THIS SOMEWHAT AT LENGTH THAT YOU WERE DESIGNATED AS THE PERSON MOST KNOWLEDGEABLE – OR, RATHER, MOST QUALIFIED TO TESTIFY ON BEHALF OF ORANGE COUNTY SOCIAL SERVICES REGARDING THE POLICIES AND PROCEDURES AS APPLIED IN THE CASE INVOLVING DEANNA FOGARTY-HARDWICK; CORRECT?

"ANSWER: YES."

* * *

No. G039045

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

FOGARTY – HARDWICK

vs. **NO. 01CC02379**

COUNTY OF ORANGE

APPEAL FROM THE SUPERIOR COURT
OF CALIFORNIA
COUNTY OF ORANGE

HONORABLE RONALD L. BAUER,
JUDGE/COMMISSIONER

CLERK'S TRANSCRIPT

(Filed Nov. 6, 2007)

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[20] LAMOREAUX JUSTICE CENTER –
ORANGE, CALIFORNIA

THURSDAY, FEBRUARY 17, 2000

MORNING SESSION

DEPARTMENT L-31

HON. GARY BISCHOFF, REFEREE

THE COURT: ALL RIGHT. WE ARE ON THE RECORD IN THE MATTER OF [K.] AND [P.] HARDWICK.

APPEARANCES FOR THE RECORD, PLEASE.

MS. RILEY: JOYCE RILEY, DEPUTY COUNTY COUNSEL, ON BEHALF OF SOCIAL SERVICES AGENCY.

MS. CIANFRANI: KAREN CIANFRANI FOR THE CHILDREN.

MS. BENDER: CARA BENDER ON BEHALF OF THE MINORS' MOTHER, DEANNA HARDWICK. SHE IS PRESENT IN COURT. IN ADDITION, THE MINORS' MATERNAL GRANDFATHER AND NANNY IS PRESENT IN COURT.

MR. STAPLETON: MARLIN STAPLETON ON BEHALF OF THE MINORS' FATHER. HE IS PRESENT IN COURT.

THE COURT: WE ARE HERE TODAY FOR A REVIEW THAT THE COURT SET BECAUSE THE COURT WAS CONCERNED ABOUT THE LEVEL OF VISITATION AND SOME OF THE CONFLICTS THAT WERE OCCURRING BETWEEN THE PARENTS REGARDING THE CHILDREN. SO THE COURT SET THIS DATE TO DETERMINE WHAT, IF ANY, ACTION THE COURT SHOULD TAKE.

I HAVE READ AND CONSIDERED THE REPORT, WHICH IS DATED TODAY'S DATE.

THE RECORD SHOULD ALSO REFLECT THAT THE COURT [21] AND COUNSEL CONFERRED PRIOR TO GOING ON THE RECORD AND HAD A DISCUSSION WITH MARCIE VREEKEN REGARDING SOME OBSERVATIONS

THAT THE WORKER MADE IN THE CASE. AND I HAVE INDICATED TO COUNSEL THE COURT'S INCLINATION IS TO ORDER SOCIAL SERVICES TO MOVE THE CHILDREN FROM THE MOTHER'S CARE PENDING THE NEXT HEARING.

COUNSEL, DID YOU WANT TO BE HEARD?

MS. BENDER: YES, YOUR HONOR.

WELL, YOUR HONOR, OBVIOUSLY, WE WOULD ADAMANTLY OPPOSE THE COURT'S DIRECTION TO HAVE SOCIAL SERVICES REMOVE THE MINORS FROM THEIR MOTHER'S CARE AT THIS TIME. OUR POSITION IS, YOUR HONOR, THAT THE MOTHER DID FOLLOW THE VISITATION ORDERS. THE MOTHER TRANSPORTED THE CHILDREN FOR THE VISITATIONS THAT WERE SCHEDULED TO OCCUR IN BETWEEN THE LAST COURT DATE AND TODAY'S DATE.

THE MOTHER HAD NO CONTROL OVER WHETHER THE CHILDREN WANTED TO VISIT WITH THEIR FATHER ON ANY PARTICULAR DAY, AND SHE SO RESPECTED THE COURT'S ORDER THAT SHE DID TAKE THE CHILDREN TO THE VISITATION, EVEN THOUGH SHE DID HAVE CONCERNS ABOUT THE VISITATION OCCURRING WITH MR. DELGADEO MONITORING THE VISITS IN LIGHT OF THE ALLEGATIONS THAT HAD BEEN MADE REGARDING ALLEGED CONDUCT THAT HAD OCCURRED DURING A PREVIOUS VISITATION THAT HE MONITORED.

YOUR HONOR, MS. VREEKEN ONLY GAVE US INFORMATION TODAY ABOUT INFORMATION THAT SHE RECEIVED [22] REGARDING SOMEONE ELSE'S OBSERVATIONS. THE COURT INDICATED THAT BASED ON SOME OBSERVATIONS THAT MS. VREEKEN HAD. THE ONLY INFORMATION THAT SHE IMPARTED TO THE COURT AND COUNSEL WAS INFORMATION THAT ALLEGEDLY ANOTHER SOCIAL WORKER HAD OBSERVED WHICH MY CLIENT VEHEMENTLY DENIES AT THIS TIME.

YOUR HONOR, AS I MENTIONED EARLIER THIS MORNING WHEN WE WERE DISCUSSING THE CASE, I SPOKE WITH THE CHILDREN'S THERAPIST THIS MORNING AND DISCUSSED WITH HER THE IMPACT THAT REMOVAL FROM THE MOTHER'S CARE WOULD HAVE ON THESE CHILDREN, AND SHE INDICATED THAT IT WOULD BE SEVERELY, SIGNIFICANTLY TRAUMATIC FOR THESE CHILDREN TO BE REMOVED FROM THEIR MOTHER'S CARE AT THIS POINT IN TIME.

I WOULD JUST STRENUOUSLY URGE THE COURT NOT TO MAKE AN ORDER DIRECTING SOCIAL SERVICES TO REMOVE THE CHILDREN FROM MOTHER'S CARE BECAUSE IT'S GOING TO BE INCREDIBLY TRAUMATIC FOR THESE CHILDREN. THEY ARE FRAGILE AS IT IS, AND MOTHER HAS OBEYED THE COURT'S ORDER TO FACILITATE THE VISITATION.

I WILL SUBMIT ON THAT AT THIS POINT.

THE COURT: MS. VREEKEN, YOUR COMMENT WAS THAT THE MOTHER HAD TOLD THE CHILDREN IN SOMEONE'S PRESENCE THAT THE FATHER WAS TRYING TO TAKE THE CHILDREN AWAY FROM HER?

MS. VREEKEN: YES.

THE COURT: AND WHO WAS THE PERSON THAT WAS PRESENT WHEN THAT STATEMENT WAS MADE?

MS. VREEKEN: ELAINE WILKINS.

[23] THE COURT: IS THAT THE LADY THAT'S SITTING NEXT TO YOU?

MS. VREEKEN: YES.

THE COURT: MA'AM, IS THAT WHAT WAS SAID?

MS. WILKINS: YES.

MR. STAPLETON: YOUR HONOR, UNLESS THE COURT IS INCLINED TO CHANGE ITS INDICATED RECOMMENDATION, I WOULD SUBMIT.

AS THE COURT KNOWS, OUR POSITION IS THAT THE MOTHER IS EXERTING AN ENORMOUS AMOUNT OF INFLUENCE OVER THESE CHILDREN AND THAT IT'S VERY CLEAR FROM THE SEQUENCE OF EVENTS JUST IN THE LAST

WEEK, LET ALONE THE LAST SEVERAL MONTHS, THAT THIS IS OCCURRING. AND THE ONLY WAY WE ARE GOING TO KNOW WHAT'S HAPPENING IN THIS CASE IS TO HAVE THESE KIDS PLACED IN A NEUTRAL SETTING WHERE THIS STUFF DOESN'T OCCUR. IT'S VERY OBVIOUS IT'S OCCURRING. WE KNOW THE CHILDREN – AT LEAST [K.] IS MAKING ALLEGATIONS WITH REGARD TO THE MONITORS AND NOW WE HAVE TO GET TO THE BOTTOM OF THIS.

WE HAVE ANOTHER ALLEGATION THAT APPARENTLY IS MADE TO THE CHILDREN'S THERAPIST THAT THE SOCIAL WORKER IS "THE ONE WHO TOLD US THAT WE ARE GOING TO BE PUT IN A FOSTER HOME." IT'S VERY CLEAR THAT'S HAPPENING AND IT'S VERY CLEAR THAT – I UNDERSTAND THAT IT'S TRAUMATIC AND NOBODY WANTS TO SEE THIS HAPPEN TO THE CHILDREN, BUT ON THE OTHER HAND, THESE KIDS ARE BEING TRAUMATIZED WHERE THEY [24] ARE. THE KIDS JUST DON'T KNOW IT.

THEY NOW THINK THEIR FATHER IS SOME SORT OF MONSTER, TO THE POINT OF THROWING A TANTRUM AND HAVING HORRIBLE FITS WHEN THEIR MOTHER IS GETTING THEM READY FOR VISITS WITH FATHER. THEN WE HEAR BY THEMSELVES WITH THE FATHER, THEY SEEM TO BE JUST FINE. THAT'S NOT FAIR AND IT SHOULD BE FIXED.

THE COURT: MS. CIANFRANI?

MS. CIANFRANI: THIS IS SO DIFFICULT WHEN WE WERE IN COURT JUST A WEEK AGO AND THE MOTHER WAS IN COURT AND SHE HAD SPECIFIC INSTRUCTIONS ABOUT COOPERATING WITH THE VISITS. TO EVEN THINK THAT SHE WOULD TELL THE CHILDREN THAT THEIR FATHER IS TRYING TO GET THEM REMOVED FROM THE HOME IN FRONT OF A MONITOR BAFFLES MY MIND.

I MEAN, I DO THINK THIS IS A DILEMMA. IT WILL BE TRAUMATIC FOR THE CHILDREN TO BE REMOVED. AND, ALSO, WHEN THE CHILDREN ARE REMOVED, THEY ARE GOING TO THINK IT'S FATHER'S FAULT AND IT'S GOING TO FALL INTO WHAT MOTHER SAID. I DON'T SEE A WHOLE LOT CF CHOICES. I DON'T KNOW IF THERE IS A RELATIVE OR A LESS SEVERE WAY THAN BRINGING THEM INTO ORANGEWOOD.

I RECEIVED THE PHONE CALL FROM MY INVESTIGATOR ON THE HOLIDAY, FRIDAY, THAT MOTHER WAS PAGING HER, TRYING TO CLARIFY THINGS. AND I HAD EXPLAINED TO HER THAT I KNEW MOTHER HAD TALKED TO HER OWN ATTORNEY. THE MOTHER HAD BEEN IN COURT AND KNEW WHAT THE RULES WERE, BUT IN ONE WEEK – I [25] AM GOING TO SUBMIT ON THIS AND ASK THAT IF THE CHILDREN ARE REMOVED, THAT THEY DO IT AS GENTLY

AS POSSIBLE AND FIND AS MUCH OF A HOME LIFE SETTING AS POSSIBLE.

MR. STAPLETON: YOUR HONOR, WITH REGARD TO THAT –

THE COURT: HOLD ON.

MS. RILEY?

MS. RILEY: YOUR HONOR, THE AGENCY HAS SUBMITTED THE REPORT WITH ALL THE INFORMATION THAT IT HAS. IT IS NOT IN A POSITION TO RECOMMEND ONE WAY OR THE OTHER. THIS IS DISTURBING. SO WE WILL JUST SUBMIT IT TO THE COURT.

MS. BENDER: YOUR HONOR, MAY I RESPOND BRIEFLY?

THE COURT: GO AHEAD.

MS. BENDER: WELL, YOUR HONOR, WITH RESPECT TO THE COMMENTS THAT MS. CIANFRANI MADE, THE MOTHER DID MAKE SEVERAL PHONE CALLS IN ORDER TO CLARIFY WHETHER OR NOT MR. DELGADEO WAS APPROVED TO BE THE MONITOR FOR THE VISITATION OVER THE WEEKEND.

THE COURT: I KIND OF WONDER ABOUT THAT, COUNSEL, BECAUSE I SEEM TO RECOLLECT AT THE LAST HEARING SPECIFICALLY INDICATING THAT MR. DELGADEO WOULD BE AN APPROPRIATE MONITOR, AND YOUR CLIENT WAS HERE. SO WHY IS SHE

CALLING SOMEBODY TO TRY TO GET ANOTHER OPINION AS TO WHAT THE COURT JUST SAID?

MS. BENDER: WELL, YOUR HONOR, I KNOW THAT MY CLIENT CONTACTED ME AS WELL BECAUSE OF THE CONCERN THAT MR. DELGADEO HAD PREVIOUSLY BEEN REMOVED AS THE MONITOR, [26] AND IT DIDN'T APPEAR AT THIS POINT HE WOULD BE A NEUTRAL MONITOR. AND WOULDN'T IT BE WISER TO HAVE SOMEONE WHO WAS A NEUTRAL MONITOR IF THEY COULD FIND A MONITOR THAT WOULD BE APPROPRIATE AND AGREED UPON BY BOTH PARENTS?

THE COURT: SO EVEN AFTER I MADE THE ORDER, EVEN AFTER I HAD INDICATED THAT MR. DELGADEO WAS AN APPROPRIATE MONITOR, YOUR CLIENT WAS STILL CALLING AROUND TO SEE WHAT SHE COULD DO, MANIPULATING THAT SITUATION SO THAT WE WOULD HAVE SOMEBODY ELSE AS A MONITOR; IS THAT IT?

MS. BENDER: WELL, YOUR HONOR, NO. I DON'T BELIEVE THAT THAT IS THE CASE. I KNOW THAT WE HAD OFF-THE-RECORD DISCUSSIONS –

THE COURT: NO. THIS WAS ON THE RECORD, COUNSEL. I AM WILLING TO BET YOU THAT IT'S ON THE RECORD. I TALKED ABOUT MR. DELGADEO SPECIFICALLY WHEN I WAS TALKING TO THE PARENTS AND TALKING

ABOUT HOW THEY HAD TO COOPERATE WITH THE SITUATION. AND THAT'S WHY I HAVE A HARD TIME UNDERSTANDING THAT YOUR CLIENT, AFTER I HAVE MADE THE ORDER ALREADY THAT MR. DELGADEO WOULD BE AN APPROPRIATE MONITOR – UNDERSTANDING WHY YOUR CLIENT IS STILL TRYING TO GET OTHER FOLKS TO CHANGE THAT.

MS. BENDER: WELL, YOUR HONOR, IT WAS MY RECOLLECTION THAT THE COURT DID INDICATE THAT THE PRIOR VISITATION SCHEDULE AS IT HAD BEEN SET UP WAS APPROPRIATE. IT WAS NOT MY RECOLLECTION THAT THE COURT SPECIFICALLY MENTIONED HECTOR DELGADEO ON THE RECORD.

[27] I KNOW WE HAD NUMEROUS DISCUSSIONS OFF THE RECORD, AND I RELAYED THAT INFORMATION TO MY CLIENT. IT WAS NOT MY RECOLLECTION THAT YOU SPECIFICALLY STATED HECTOR DELGADEO. I RECALL THE COURT SPECIFICALLY STATING THAT THE PRIOR VISITATION HAD BEEN SET UP AND WAS COMPLETELY APPROPRIATE – I APOLOGIZE –

THE COURT: WE CAN GO OFF THE RECORD. YOU HAVE GOT YOUR NOTES FROM FEBRUARY 8TH?

(RECORD READ.)

THE COURT: IT DOES APPEAR THE MOTHER WAS NOT PRESENT WHEN THE

COURT DISCUSSED MR. DELGADEO SPECIFICALLY.

ANYTHING ELSE?

MS. BENDER: YOUR HONOR, JUST TO ADD THAT MOTHER INFORMED ME THAT IT'S ANOTHER PERSON THAT WAS PRESENT WHEN THERE WAS A DISCUSSION THAT OCCURRED; THAT MS. VREEKEN AND MS. WILKINS – THE MOTHER IS ADAMANTLY DENYING THAT THOSE STATEMENTS WERE MADE REGARDING WHETHER OR NOT IT WAS SAID.

TO TAKE THE CHILDREN OUT OF THE MOTHER'S CARE AND CUSTODY AGAIN – SHE IN NO WAY HAS INFLUENCED THE CHILDREN AND HAS IN NO WAY TRIED TO INTERFERE WITH OR OBSTRUCT THE COURT'S VISITATION ORDER.

THE COURT: OKAY. COUNSEL?

MR. STAPLETON: YOUR HONOR, AS TO-THE ISSUE OF MR. DELGADEO, MS. BENDER SPECIFICALLY SAID THAT HER CLIENT CALLED HER – NOT TO GET TO ANY ATTORNEY-CLIENT PRIVILEGE STUFF – BUT HER CLIENT CALLED HER TO ASK. AND MS. BENDER [28] WAS CERTAINLY PRESENT WHEN THAT STATEMENT WAS SAID, THAT HECTOR WAS FINE. WE HAVE TO ASSUME THAT THAT KIND OF INFORMATION HAS BEEN RELAYED, BUT THAT'S A SIDE-TRACKED ISSUE.

THE ISSUE IS STILL THAT SHE IS STILL – THAT'S WHAT WE ARE WORRIED ABOUT ANY MORE THAN ANYTHING ELSE – SHE IS STILL EXERTING THIS INFLUENCE OVER THESE CHILDREN BY MAKING THESE STATEMENTS. THE DAUGHTER CALLED UP LAST NIGHT AND MAKES THIS STATEMENT TO HER FATHER AND HANGS UP. THAT IS INFERRING, WITHOUT A DOUBT, IT DOESN'T REALLY MATTER ABOUT HECTOR AT THIS POINT IN TIME.

WHAT MATTERS IS ALL THE INFLUENCE THAT'S BEING EXERCISED OVER THESE CHILDREN, AND THAT'S WHAT WE HAVE ALLEGED FROM THE BEGINNING IN THIS CASE. NOW IT'S FINALLY COMING OUT, AND THE ONLY WAY WE CAN FIND OUT WHAT'S REALLY HAPPENING IN THIS CASE IS TO REMOVE THE CHILDREN, AS SAD AS THAT IS AND AS HARD AS THAT IS.

THERE IS A COUSIN, MY CLIENT'S COUSIN, WHO HAS TWO DAUGHTERS OF HER OWN THAT – I KNOW HE HAS MADE A REQUEST FOR PLACEMENT. THE PREVIOUS LAWYER MADE A GIGANTIC PLACEMENT REQUEST MENTIONING HER NAME. IF THERE IS A WAY TO POSSIBLY INVESTIGATE HER IN AN EXPEDITIOUS MANNER TO SEE IF SHE WOULD BE SUITABLE – SHE HAS A STABLE HOME AND TWO OTHER DAUGHTERS – THAT CERTAINLY WOULD BE A GOOD CHOICE OTHER THAN JUST PLACING THEM IN ORANGEWOOD.

I KNOW THAT THE MOTHER DIDN'T WANT THAT TO [29] HAPPEN BECAUSE MY CLIENT KNOWS THE PERSON AND APPARENTLY GETS ALONG WITH THEM WELL. THAT'S THE SAME PROBLEM THAT SHE HAS WITH HECTOR. THAT'S THE SAME PROBLEM THAT SHE HAS WITH DR. HOWELL THAT DID THE ORIGINAL 730 EVALUATION WHO SAYS NEGATIVE THINGS TOWARDS HER, IS AUTOMATICALLY SUSPECT AND IS HAVING SOME SORT OF CONSPIRACY WITH MY CLIENT. BUT IT'S CERTAINLY A BETTER OPTION AND SEEMS TO BE AN AVAILABLE OPTION FOR PLACEMENT. HER NAME IS MICHELLE EDWARDS.

MS. BENDER: IF I COULD JUST ADD THAT WE SUGGEST THAT THE SOCIAL SERVICES CONSULT WITH THE MINORS' THERAPIST IMMEDIATELY BECAUSE THERE IS GOING TO BE SIGNIFICANT TRAUMA WITH THIS TRANSITION. AND NOT ONLY ARE WE DEALING WITH ALLEGATIONS OF SEXUAL ABUSE, BUT THERE ARE ALLEGATIONS OF PHYSICAL ABUSE ON THE FATHER'S PART IN THE FATHER'S HOME.

SO OUR CONCERN WITH PLACING THE CHILD WITH ANY RELATIVE THAT WOULD HAVE UNDUE INFLUENCE – THE COERCION, THE UNNECESSARY PERSUASION CAN GO BOTH WAYS. IT'S PROBABLY JUST MORE BENEFICIAL AT THIS POINT FOR THE COURT TO HAVE THE CHILDREN IN A MUTUAL SETTING,

AS TRAUMATIC AS IT IS GOING TO BE IF THE COURT – WELL, THE COURT HAS ALREADY STATED IT INTENDS TO DIRECT S.S.A. TO REMOVE THE CHILDREN.

THE COURT: I HAVE BEEN DOING THIS SINCE I THINK ABOUT 1990. THAT'S HOW LONG I HAVE BEEN ON THE BENCH. I DON'T THINK I HAVE EVER HAD TO ORDER SOCIAL SERVICES TO REMOVE A CHILD FROM A HOME BEFORE. THIS IS REMARKABLE BECAUSE WE WERE JUST HERE. I WARNED THE PARENTS WHAT WOULD [30] HAPPEN.

AND IT'S INTERESTING BECAUSE WHETHER OR NOT THE MOTHER KNEW OF THE COURT'S DECISION REGARDING WHETHER OR NOT MR. DELGADEO WAS AN APPROPRIATE MONITOR, IT'S INTERESTING TO NOTE TO THE COURT THAT ONCE THE MOTHER HAD MADE A DECISION AS TO WHETHER SHE LIKED MR. DELGADEO OR NOT, HER CHILDREN DECIDED THEY DIDN'T LIKE MR. DELGADEO. AND I NOTE THAT THE THINGS THAT THE CHILDREN SAY WHEN THEY ARE VILIFYING THE FOLKS THAT MOTHER DOESN'T LIKE ARE VERY CONCLUSIONARY AND THERE IS NO REAL DETAIL AS TO WHAT, EXACTLY, IT IS. THAT'S THE PROBLEM.

IN THIS PARTICULAR CASE WHEN THEY ARE TALKING ABOUT MR. DELGADEO,

[K.] SAYS THAT MR. DELGADEO THREATENED HIM, AND THEN WHEN HE IS ASKED WHAT WAS SAID, HE SAID, "WELL, COME ON. I WILL GO WITH YOU." NOW, THAT TELLS ME THAT YOU HAVE GOT A CHILD WHO HAS BEEN TOLD THAT SOMEBODY HAS THREATENED HIM WITHOUT KNOWING WHAT THREATENING MEANS.

WITHOUT REGARD TO WHETHER OR NOT THE CONDUCT BY THE FATHER HAD TAKEN PLACE OR NOT, THIS IS JUST NOT ACCEPTABLE. YOU ARE USING THESE CHILDREN, MA'AM. THERE IS NO QUESTION IN MY MIND, BASED ON WHAT I HAVE GOT RIGHT NOW BEFORE ME, THAT THAT'S WHAT'S GOING ON.

WE ARE GOING TO HAVE A TRIAL ON THE 28TH. AND IT MAY WELL BE THAT YOU ARE RIGHT AND YOU DIDN'T SAY THESE THINGS, BUT FROM THE EVIDENCE I HAVE BEFORE ME RIGHT NOW, [31] IT LOOKS LIKE YOU ARE. AND JUST AS AT THE DETENTION HEARING, I HAVE GOT TO BE LOOKING OUT FOR THE WELFARE OF THESE CHILDREN. I HAVE GOT TO DO THAT TODAY, TOO, BASED ON WHAT I HAVE BEFORE ME, RIGHT NOW. AS MUCH AS I DO NOT WANT TO REMOVE THESE CHILDREN FROM YOUR CARE, I THINK I HAVE NO OTHER CHOICE BUT TO DO THAT.

SO I AM GOING TO FIND THAT IT'S OF IMMEDIATE AND URGENT NECESSITY FOR THE

PROTECTION OF THESE CHILDREN THAT THEY BE REMOVED FORM YOUR HOME, AND I FIND THAT TO LEAVE THESE CHILDREN IN YOUR HOME AT THIS TIME WOULD CREATE A SUBSTANTIAL RISK OF EMOTIONAL AND PSYCHOLOGICAL DETRIMENT TO THESE CHILDREN. I AM ORDERING SOCIAL SERVICES AGENCY TO REMOVE THESE CHILDREN FROM THE HOME.

I AM ALSO GOING TO ORDER, MA'AM, THAT YOU NOT DISCUSS THIS IN ANY WAY. I DON'T CARE HOW IT COMES ABOUT, BUT YOU HAD BETTER NOT SAY A SINGLE WORD IN THE PRESENCE OF THESE CHILDREN ABOUT HOW THIS HAS TAKEN PLACE OR HOW THIS HAS COME ABOUT. AND IF YOU DO, I WILL FIND YOU IN CONTEMPT OF COURT AND I WILL PUT YOU IN JAIL.

DO YOU UNDERSTAND ME?

THE MOTHER: YES, SIR I DO UNDERSTAND YOU. I HAVE FOLLOWED YOUR INSTRUCTIONS, I ASSURE YOU. I RESPECTED THEM.

THE COURT: SO THE CHILDREN ARE TO BE REMOVED FORTHWITH. WE WILL HAVE THE CHILDREN DETAINED AT ORANGEWOOD – WELL, I WILL TELL YOU WHAT. YOU GO AHEAD AND [32] REMOVE THE CHILDREN AND WE WILL HAVE A DETENTION HEARING AS SOON AS YOU DO. IN FACT, I THINK YOU NEED A NEW PETITION. SOCIAL SERVICES WILL NEED TO

FILE A NEW PETITION THAT AMENDS IT TO MAKE THESE ALLEGATIONS AS WELL.

THE MOTHER: CAN THE NANNY BRING THE CHILDREN TO ORANGEWOOD CHILDREN'S HOME?

THE COURT: ARE THE CHILDREN WITH THE NANNY NOW?

MS. BENDER: YOUR HONOR, THE MINOR [K.] IS HOME ILL TODAY. THE MINOR [P.] IS IN HER SCHOOL SETTING.

THE COURT: WHO IS WITH [K.]?

MS. BENDER: THE GRANDMOTHER IS AT HOME WITH [K.].

THE COURT: I WOULD SUGGEST THAT THE WORKER GO OUT IMMEDIATELY AND PICK UP [K.] AND THEN PICK UP THE OTHER CHILD WHEN – WHAT TIME DOES THE OTHER CHILD COME HOME FROM SCHOOL?

MS. BENDER: 2:15, YOUR HONOR.

THE COURT: I SUGGEST THE WORKER GO THERE TO PICK UP THE CHILD WHEN THE CHILD GETS HOME.

MS. BENDER: WELL, YOUR HONOR, PERHAPS – COULDN'T WE AT LEAST COMMUNICATE WITH THE THERAPIST AND PERHAPS HAVE THE THERAPIST AVAILABLE?

UNFORTUNATELY, THIS WORKER IS, BRAND NEW.

THE COURT: I DON'T KNOW ANYTHING ABOUT THE THERAPIST. WHO HIRED THE THERAPIST?

MS. BENDER: YOUR HONOR, THIS THERAPIST HAS BEEN SEEING THESE CHILDREN FOR SEVERAL YEARS.

[33] THE COURT: WHO HIRED THE THERAPIST?

THE MOTHER: THE 730 EVALUATOR REQUESTED THAT A THERAPIST BE GIVEN TO THE CHILDREN. IT WAS AGREED UPON BY THE EVALUATOR.

THE COURT: WHO HIRED THE THERAPIST?

MS. BENDER: MRS. HARDWICK IS –

THE MOTHER: EXCUSE ME. MR. HARDWICK AND I BOTH HAVE GONE TO THE THERAPIST WITH THE CHILDREN.

THE COURT: IS THERE AN ANSWER TO MY QUESTION?

MS. BENDER: YOUR HONOR, APPARENTLY BOTH PARENTS SHARE THE COST OF THE THERAPIST.

THE COURT: WHO HIRED THE THERAPIST?

MS. BENDER: BOTH OF THE PARENTS DID, AS A RESULT –

THE COURT: BOTH PARENTS HIRED THE THERAPIST?

THE MOTHER: WE HAD TO BE IN AGREEMENT.

MS. CIANFRANI: I THINK THE THERAPIST IS APPROPRIATE AND SHE IS LOOKING OUT FOR THE CHILDREN'S BEST INTEREST. I THINK SHE CAN BE NEUTRAL, AS FAR AS I KNOW, SINCE OUR LAST DISCUSSION WITH HER ABOUT WHAT'S GOING ON IN HERE. SHE REALIZES THE CHILDREN ARE BEING PULLED APART BY THIS, AND I THINK IT MIGHT BE BEST IF SHE COULD GO OVER TO ORANGEWOOD OR WHEREVER THEY ARE PLACED.

THE COURT: WELL, THE ONLY THING THAT CONCERNS ME ABOUT IT IS YOU HAVE GOT THAT THERAPIST ALSO, WITH THE KNOWLEDGE THAT YOU HAVE INDICATED, SAYING THAT NOTHING SHOULD HAPPEN IN TERMS OF PROTECTING THE CHILDREN FROM THE [34] INFLUENCE THAT'S TAKING PLACE. SO I HAVE GOT SOME CONCERNS ABOUT THAT.

MS. CIANFRANI: I DON'T HAVE ANY DIRECT INFORMATION FROM THE THERAPIST AT THIS POINT. I COULD CALL.

THE COURT: I AM HEARING IT FROM MS. BENDER. SHE SAYS THAT THE THERAPIST IS TELLING HER THAT THE CHILDREN SHOULDN'T BE REMOVED.

MS. CIANFRANI: MAYBE IT'S BASED ON NOT WHAT HAPPENED IN COURT TODAY OR WHAT KNOWLEDGE THE COURT HAD, BUT BASED ON MOTHER'S RENDITION.

MS. BENDER: OBVIOUSLY, YOUR HONOR, I DON'T HAVE THE INFORMATION FROM MS. VREEKEN OR MS. WILKINS. WHEN I SPOKE TO MS. MITCHELL – SHE HAS BEEN TREATING THESE CHILDREN FOR A LENGTHY PERIOD OF TIME. SHE DOES APPEAR VERY NEUTRAL. AND I THINK THE CHILDREN DON'T KNOW MS. VREEKEN VERY WELL. THEY HAD A BETTER ASSOCIATION WITH MS. DAVIS.

THE MINOR [K.] HAS SPECIFIC MEDICAL CONDITIONS AS FAR AS BEING DIAGNOSED WITH AUTISM. AND THE CURRENT CONCERN IS THAT SHE IS GOING TO FREAK OUT IF MS. VREEKEN COMES TO TAKE THESE KIDS AWAY. I DON'T THINK SHE HAS ESTABLISHED A RELATIONSHIP THERE.

THE COURT: NO. THE AGENCY IS TO DO WHAT I TOLD THEM TO DO. IF YOU WANT TO HAVE THE THERAPIST AVAILABLE TO GO TO ORANGEWOOD AND TALK TO THE CHILDREN, THAT'S FINE. WE ARE NOT GOING TO DELAY THIS TO ACCOMMODATE THE THERAPIST. SO

THAT'S GOING TO BE DONE FORTHWITH. I WANT THE CHILDREN [35] OUT OF THE HOME.

ANYTHING ELSE?

MS. BENDER: I DON'T BELIEVE SO, YOUR HONOR.

MS. CIANFRANI: NO, YOUR HONOR.

THE COURT: WE WILL HEAR FURTHER FROM YOU REGARDING THIS WHEN WE HAVE THE DETENTION HEARING.

MS. BENDER: THANK YOU, YOUR HONOR.

MR. STAPLETON: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

TRIAL EXHIBIT NO. 40

Social Services Agency
Children And Family Services
301 The City Drive South
Orange, California 92868
Marcie Vreeken, Dependency Investigations
(714) 935-6027
V5EH
DSS No. 0D57376

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE – JUVENILE DIVISION
341 The City Drive South, Orange, California 92868

COURT REPORT ADDENDUM

Hearing Date	Hearing Time	Dept./Room	Hearing Type/ Subtype
04/03/2000	09:00am	L31	Trial

IN THE MATTER OF

Name	Date of Birth	Age	Sex	Court Number
[K.] Hardwick	09/19/1990	9	F	DP-002001
[P.] Hardwick	09/09/1993	6	F	DP-002002

SUMMARY RECOMMENDATION

Sustain Petition
Declare Dependency
Family Reunification Services to Parents

CHILDREN'S WHEREABOUTS

On March 21, 2000, the children were placed in the foster home of Cheryl and Sharon Gibson, telephone number (949) 713-5148. Prior to that, they were placed in Orangewood Children's Home. Prior to that, they were placed with their mother.

ADDITIONAL INFORMATION

On March 30, 2000, the undersigned spoke with Cheryl Gibson, the children's foster mother.

* * *

Ms. Gibson stated that [K.] talks about her fears of going to Orangewood Children's Home. [P.] teases her about this, which makes [K.] more fearful. [K.] stated that there were too many people at Orangewood Children's Home, and the kids had to wait in line to go to the bathroom. [K.] has expressed her fear of returning to Orangewood Children's Home numerous times. [K.] teases [P.], but it appears to be normal between the siblings. [K.] places the blame of being in foster care on the Court. [K.] will make excuses to avoid visiting with her dad. She will say that she misses too much school. [K.] became frustrated with her math homework and wanted to call her mother.

However, later decided not to. The children know they can call their mom or dad. They can recite the telephone numbers, but decline to call their parents. The children miss Rosie and her children.

Ms. Gibson stated that the children have exhibited sadness at times and after the session with Dr. Mitchell. While she and the children drove by the freeway exit near the children's home, [K.] waved at the house and said that she missed her mom. [K.] says that she wishes this could be over so she could return home.

The foster mother does not see these children decompensating. "They are taking each moment as it comes." Of course they look forward to returning home. When the mother calls, she speaks in a very sad tone, which brings the kids down. The children then become sad.

On March 31, 2000, at approximately 4:15 p.m. Senior Social Services Supervisor Helen Dwojak brought to the Court, a letter written by Dr. Mitchell, the children's therapist. This letter was faxed to the Social Services Manchester Office Building (see attachment).

Ms. Dwojak stated that Ms. Fogarty, who identified herself as the children's maternal grandmother, came to Manchester Office Building, 3rd floor at approximately 3:50 p.m., and contacted Aide Padilla the receptionist. Ms. Padilla stated that Ms. Fogarty told her that Senior Social Worker, Marcie Vreeken had sent her over to pick up papers that a doctor was

going to fax for the Hardwick case. Ms. Fogarty seemed to be in a hurry and said, "Marcie's at Court waiting for me." Ms. Padilla was hesitant to give the letter to Ms. Fogarty and contacted Supervisor Helen Dwojak. Ms. Fogarty also said she wanted custody of the children, because the psychologist said the children were going through trauma.

Senior Social Services Supervisor, Helen Dwojak, asked Ms. Fogarty who sent her to pick up the letter and Ms. Fogarty stated, "the Court, they need a fax that was sent to Marcie Vreeken." Ms. Dwojak did not give the letter to Ms. Fogarty, but took the letter and walked with Ms. Fogarty to Court. On the way to Court, Ms. Fogarty said that the attorneys had called Dr. Mitchell today and Dr. Mitchell was leaving town at 1:00 p.m. and would fax something over before she left.

Prior to March 31, 2000, at approximately 4:15 p.m., the undersigned was not aware that the document (letter from Dr. Mitchell) existed and at no time requested that Ms. Fogarty pick up the letter to bring to Court. The undersigned had no conversation with Ms. Fogarty on March 31, 2000. The undersigned was present in Court on March 31, 2000, and at no time did the Court request that Ms. Fogarty pick up a letter from the Social Services Agency.

On March 30, 2000, the undersigned received a telephone message from Dr. Mitchell, telephone number (562) 494-6726. Dr. Mitchell stated that she saw the children on Wednesday, March 29, 2000. The

children have a very nice foster mom and the children seem glad to be in a foster home setting. Dr. Mitchell said that [K.] seems to be shutting down. [K.] blames herself and expressed that "she never should have disclosed. Maybe he would never do it again. She should have kept her mouth shut." Dr. Mitchell expressed the concern that [K.] sobbed the entire time she was here and seems devastated. (see attachment).

The undersigned has not had an opportunity to talk with Dr. Mitchell about her fax letter dated March 31, 2000, as she is out of town.

On March 31, 2000, the undersigned spoke to Kathy O'Conner, school psychologist for Melinda Heights Elementary, telephone number (949)888-7311. Ms. O'Connor said that [K.] had adjusted well and has made friends in her class. Her concern was that the Special Education class consisted of 4th, 5th and 6th grade boys and if placed in that class, [K.] would be the only girl. Ms. O'Conner suggested that [K.] remain in her 4th grade class for half of the day with modified work and attend a Resource Special Program (RSP) with a very small group (varies from 2 to 5 children) for math and reading for the remainder of the day. Ms. O'Connor believes that the school can accommodate the child's academic needs. She proposes this schedule for 30 days and at the end of that time, the child's adjustment and progress will be evaluated.

On March 31, 2000, both parents were told of this proposal and given the name and number of the school psychologist.

Respectfully Submitted,

Larry M. Leaman, Director
Orange County Social Services Agency

By

/s/ Marcie Vreeken — 04/03/2000
Marcie Vreeken, — **Date**
Senior Social Worker,
V5EH, (714) 935-6027

/s/ Helen L. Dwojak — 04/03/2000
Helen L. Dwojak, — **Date**
Senior Social Services
Supervisor, (714) 935-6028

mz

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(3)

No. 10-857

Supreme Court, U.S.
FILED
MAR 16 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

COUNTY OF ORANGE [CALIFORNIA],
HELEN DWOJAK and MARCIE VREEKEN,

Petitioners,

v.

DEANNA FOGARTY-HARDWICK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth District, Division Three

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

In addition to the statutes Petitioners identified, California Government Code §820.21 provides in pertinent part:

> (a) Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code shall not extend to any of the following, if committed with malice:
>
> (1) Perjury.
>
> (2) Fabrication of evidence.
>
> (3) Failure to disclose known exculpatory evidence.
>
> (4) Obtaining testimony by duress, as defined in Section 1569 of the Civil Code, fraud, as defined in either Section 1572 or Section 1573 of the Civil Code, or undue influence, as defined in Section 1575 of the Civil Code.
>
> (b) As used in this section, "malice" means conduct that is intended by the person described in subdivision (a) to cause injury to the plaintiff or despicable conduct that is carried on by the person described in subdivision (a) with a willful and conscious disregard of the rights or safety of others.

Similarly, California Welfare and Institutions Code §203 states:

> An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.

INTRODUCTION

The Petitioners' "questions presented" are not supported by the facts or procedural posture of this case. Here, as on appeal below, Petitioners misstate the thrust of the case and ignore the evidence favorable to Respondent, Deanna Fogarty-Hardwick. They draw unreasonable inferences to support their position and recite evidence never admitted at trial, without so alerting this Court. *See* Pet. App. 2, fn.2, (p.) 37 (The California Court of Appeal found: "[O]nce again the County has crafted an argument without fully acknowledging what *actually occurred* in the trial court below."). The result is a skewed, incorrect, and inappropriate presentation which fatally undermines the propriety of the "questions" Petitioners purport to present.

Here is what really happened: Consistent with Orange County's standard operating procedures, on February 23, 2000, social services agent Marcie Vreeken made allegations against Fogarty-Hardwick in a juvenile dependency petition when she knew no

evidence supported the allegations. Resp. App. 23-29, 33-40, 45-52, 62-65, 68-69, 71-72, 125-128. Orange County social service agents then fabricated evidence, perjured themselves, and withheld exculpatory evidence from the juvenile court. Resp. App. 120-123, 143-145. Their lies and omissions caused the removal and continued detention of Fogarty-Hardwick's daughters, who were six and nine years old at the time. Resp. App. 79-82. Fogarty-Hardwick was swept into a maelstrom that would consume her and her children's lives for the next six and one half years. By the time Fogarty-Hardwick and her children were released from the clutches of social services, she had been destroyed physically, emotionally, and financially. Pet. App. 25-26, fn.5; Resp. App. 40-44, 102.

Petitioners strain the facts in attempting to analogize this case to *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010). Any perceived correlation is belied by the finding that substantial evidence was presented to show that what was done to Fogarty-Hardwick was "*not an isolated incident*." Pet. App. 50. Moreover, in a footnote, Petitioners concede Fogarty-Hardwick "did show a pattern," i.e., that the County has a practice of allowing its agents to state allegations in juvenile dependency petitions when they know there is no evidence to support them. Petition page 24, fn.5. The uncontroverted evidence showed there was no "limitation on the allegations [the Social Services Agency (SSA)] can make against a parent

where there is no evidence to support the allegation." Resp. App. 72.[1]

Petitioners conclude this practice or "pattern of conduct did not harm Deanna, and was not the basis for the imposition of damages." Petition page 24, fn.5. The jury, the trial judge, and the appellate court *all* disagreed with Petitioners on this critical *factual* question.

In another recent unpublished decision the same Court of Appeal explained the problem with Orange County's practice and again admonished it:

> This kind of pleading undermines confidence in the system. It damages the reputation of the Social Services Agency ["SSA"] and causes parents to suspect the system is prejudiced against them, and social workers will use any excuse they can think of – whether credible or not – to deprive them of the custody of their children. *It has to*

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[1] The limited excerpts of evidence submitted herewith demonstrate that Fogarty-Hardwick proved other patterns and practices as well: The practices of: knowingly stating baseless allegations against parents, including Fogarty-Hardwick, in dependency petitions (Resp. App. 15-16, 18-19, 21-22, 28-29, 62-65, 71-72 ["Question: Are you aware of any written policy which imposes any limitation on the allegations your agency can make against a parent where there is no evidence to support the allegation? Answer: I'm not aware of any."]); not investigating complaints against social workers (Resp. App. 69-70, 74-75, Hermes, 53-60); and protecting each other when faced with accusations of misconduct (77). In fact, the agency banded together against Fogarty-Hardwick (Resp. App. 34-40, 45-52).

> *stop*. . . . With great power comes great responsibility. SSA has great power. The facts of this case and others brought to us in recent months (*see, e.g., Fogarty-Hardwick v. County of Orange* (G039045, June 14, 2010) [nonpub. opn.], and *In re Tyler H.* (G043216, Aug. 26, 2010) [nonpub. opn.]) suggest the agency has somehow temporarily detoured from its long tradition of exercising that power wisely and responsibly. . . .

Resp. App. 190-191.

STATEMENT OF THE CASE

Petitioners' statement of the case is incorrect in material aspects. Abbreviated below are the salient facts the appellate court found. Its statement of facts is binding. *See* California Rules of Court, Rule 8.500(c)(2); *Marriage of Goddard* 33 Cal. 4th 49, 53 (2004), fn.2.

A. Factual Summary.

Fogarty-Hardwick separated from her husband in 1995. They obtained a judgment of dissolution in 1998. Initially, Fogarty-Hardwick had primary custody of the couple's two daughters, K. and P. In November 1999, Fogarty-Hardwick brought K. to a therapist who had been engaged to help the girls "adjust[ ] to their father's recent remarriage." Pet. App. 3-4. They told the therapist that their father had

sexually abused K. *Id.*[2] The therapist was under a mandatory duty to report these allegations to authorities, and she did. *Id.*

The Orange County Social Services Agency (SSA) filed a dependency petition alleging P. and K. were at risk of serious physical harm or illness and sexual abuse. Pet. App. 4. At the initial detention hearing on November 19, 1999, the court ordered that the children remain in Fogarty-Hardwick's custody. *Id.* Their father was allowed monitored visitation. On February 8, 2000, SSA filed an amended petition. *Id.* Another social worker was initially assigned to the case, but Vreeken succeeded her in short order.

On February 13, 2000, Fogarty-Hardwick brought the girls to a monitored visit with their father. The children resisted. Although the monitor tried to coax them, he was unsuccessful, and Fogarty-Hardwick ultimately took them home. Pet. App. 5. Two days later, on February 15, 2000, Fogarty-Hardwick brought the girls to a monitored visit with their father at the SSA office. *Id.* After the visit Vreeken spoke with the girls alone, telling them they were *required* to visit with their father, and "if they didn't visit with their father, the judge was going to put them in a home." This caused both girls to

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[2] The purpose of the visit was *not* "to report sexual abuse" as Petitioners claim. *See* Petition 7. Nowhere in the opinion is it stated that Dr. Mitchell was "suspicious about the timing" of K.'s allegations. Although she did testify *generally* that she "always question[s] the timing of allegations."

become frightened and start to cry. P. ran to get Fogarty-Hardwick, leaving K. alone with Vreeken. *Id.* When Vreeken brought K. to join P. and Fogarty-Hardwick, K.'s face was discolored and her eyes were swollen. *Id.*

Vreeken informed Fogarty-Hardwick that she told the children they would be placed in a home if they didn't visit with their father. This upset Fogarty-Hardwick so much that she vomited. Pet. App. 5. She begged Vreeken for guidance as to what more she could do, because she didn't want to lose her daughters. Vreeken said "you'd better call your attorney." *Id.*

On February 17, 2000, two days after that disastrous meeting, the court held a hearing on the amended petition at which it had an off-the-record discussion with counsel and Vreeken. Vreeken made false allegations against Fogarty-Hardwick, including assertions that Fogarty-Hardwick had caused her daughters to skip a mandatory visit with their father, and had told the children their father was trying to take them away from her. Pet. App. 6. In reality, it was Vreeken, not Fogarty-Hardwick, who made inappropriate comments to the children, including threatening to put them "in a home" if they did not visit with their father. *Id.*

Although Fogarty-Hardwick denied all of Vreeken's assertions, the court nonetheless concluded, based upon the evidence of Fogarty-Hardwick's conduct as falsely reported by the social services agents, that she

was "using these children." The court emphasized "[t]here is no question in my mind, based on what I have got right now before me, that that's what's going on." The children were taken into SSA custody that same day. Pet. App. 6-7.

The social services agents filed a second-amended petition on February 23, 2000, in which they reiterated, as official allegations, the false claims they made to the court at the February 17th hearing. Pet. App. 7. The girls were removed from Fogarty-Hardwick's custody and placed in the Orangewood Children's Home, where they remained for more than a month. *Id.* Fogarty-Hardwick was restricted to supervised visitation. Although the court authorized SSA to return the girls to Fogarty-Hardwick's custody on February 23, 2000, the social services agents refused to do so. Instead, on March 21, 2000, the girls were moved to foster care, where they remained until May 2000. *Id.*

Meanwhile, on March 1, 2000, Vreeken and Fogarty-Hardwick had a highly-charged conversation concerning the false claims Vreeken made about Fogarty-Hardwick's conduct. Vreeken got angry and threatened that if Fogarty-Hardwick did not "submit" to her will, she would "never see [her] kids again." Pet. App. 7-8. And while both girls, and especially K., exhibited significant emotional distress in their placement, which their therapist reported to SSA, the social services agents concealed that information

from the court. Instead, Vreeken falsely claimed in testimony that the children were doing well. *Id.*[3] Both social services agents also demeaned Fogarty-Hardwick to others involved in the case, portraying her as a spoiled beauty queen who was born with all the advantages and was used to getting her way. *Id.*

Ultimately, on May 19, 2000, Fogarty-Hardwick signed a "case plan" which provided the dependency case would be dismissed and the children released from foster care upon conditions. Pet. App. 9. Specifically, the children would be released into their father's temporary custody. Fogarty-Hardwick believed that acquiescing to the plan was necessary to get her children out of foster care and that she had no choice but to agree. *Id.* The dependency case was dismissed, and the custody issue was transferred to family court. *Id.*[4]

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[3] Petitioners claim the information regarding K.'s emotional distress in placement was reported to the juvenile court, but failed to address Vreeken's false testimony to the Court while on the witness stand. *See* Petition page 13 (compare Resp. App. 120-123). Petitioners also fail to disclose that the "report" they filed came several days after the juvenile court had made its decision based on Vreeken's omissions, and the damage had been done.

[4] Petitioners' reference to the family court order and proceedings should be stricken. The order was never admitted into evidence, and their request for judicial notice on appeal was denied. Petitioners requested judicial notice of a different and unrelated document before the California Supreme Court. That request was granted.

Despite Fogarty-Hardwick's complaints and others' expressed concerns about how the dependency case was handled, SSA did not investigate or consider assigning different agents to the matter. Resp. App. 124. No involved agents were disciplined. Instead, Vreeken was promoted to supervisor in 2001. Pet. App. 9-10.

The custody proceedings in family court were protracted. The court did not enter a final order until December 2001. In that order, legal and physical custody of the children was awarded to Fogarty-Hardwick's ex-husband. That order was significantly affected by the events and outcome of the dependency case and was properly construed as evidence of Fogarty-Hardwick's continuing damages, as the Court of Appeal found. Fogarty-Hardwick finally regained shared custody of her daughters in June 2006 – over six years after they were taken from her. Pet. App. 10, 26, fn.5.

B. Procedural History.

1. The Complaint's Allegations:

Fogarty-Hardwick sued Petitioners in February 2001 alleging tort claims based on state and federal law. Pet. App. 10-11. Specifically, she alleged social services agents presented intentionally false statements, fabricated evidence, and committed perjury as part of their successful effort to convince the juvenile court to remove Fogarty-Hardwick's daughters from her custody and place them in foster care. *Id.* In

addition, Fogarty-Hardwick alleged Marcie Vreeken and her supervisor Helen Dwojak deliberately withheld exculpatory information from the court concerning the emotional trauma Fogarty-Hardwick's daughters suffered while in foster care, thereby convincing the court to extend the children's placement. *Id.* Orange County had a policy of deliberate indifference to the rights of parents in Fogarty-Hardwick's situation and, as a result of that policy, the County failed to supervise, control, or direct the conduct of its agents. *Id.*[5]

2. The Demurrer, Initial Appeal, and Remand:

The County demurred to Fogarty-Hardwick's second-amended complaint asserting collateral estoppel under state law and absolute-immunity. Pet. App. 11-12. The trial court sustained the demurrer with prejudice. Fogarty-Hardwick appealed. The appellate court reversed and remanded finding that under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2002), social services agents have absolute-immunity only for the

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[5] Although Petitioners couch this issue as one of "training," the evidence adduced at trial shows it was, in part, the County's deliberate failure to supervise its agents that caused the deprivation of Fogarty-Hardwick's constitutional rights. Resp. App. 33-40, 44-54, 58-60, 103-107, 146-164.

quasi-prosecutorial decision to institute dependency proceedings. Resp. App. 12-13.[6]

3. Petitioners' Answer and Post-Remand Proceedings:

On remand the County pled qualified immunity, but omitted collateral estoppel and absolute-immunity. Pet. App. 12-13. In April 2006, the County moved for summary judgment, arguing that (1) all the wrongful conduct alleged against Vreeken and Dwojak qualified as "quasi-prosecutorial" and was thus protected by absolute-immunity; and (2) the conduct fell within the absolute testimonial privilege. *Id.* In opposition, Fogarty-Hardwick argued Petitioners waived absolute-immunity by failing to plead it. The trial court denied the motion in October 2006. *Id.*

In December 2006, on the eve of trial, Petitioners sought leave to amend their answer to include "absolute, judicial, prosecutorial and testimonial privilege of federal law." Petitioners asked the court to exercise its discretion to allow the late amendment "in the furtherance of justice." Pet. App. 13. The court denied

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[6] Petitioners did not raise collateral estoppel or arguments based on *Heck v. Humphrey*, 512 U.S. 477 (1994) in the first appeal or in the trial court on remand. Nor did they seek California Supreme Court review of this earlier appellate decision.

the motion, finding Fogarty-Hardwick would be prejudiced by the unreasonably late amendment. *Id.*

4. The Trial, Jury Instructions, and Petitioners' Failure to Proffer Controverting Evidence Regarding Their Pre-trial Admissions:

Trial commenced in February 2007. The court read the agreed-upon instructions to the jury in March 2007.[7] Resp. App 130-137. Petitioners did not offer any clarifying instructions to suggest a more stringent level of causation was required. Nor did they offer instructions requiring Fogarty-Hardwick to prove – as an element of her claims – that she "prevailed" in the underlying dependency or family court proceedings. Both omissions are critical to the questions for which Petitioners seek certiorari.

In discovery Petitioners each admitted, among other things, that they "were at all times carrying out the customs, meaning the permanent, widespread, or well-settled practices of defendant Orange County Social Services Agency in [their] handling of the matter." Fogarty-Hardwick read these admissions to the jury at trial. Resp. App. 86-92. Petitioners did not object. Moreover, Petitioners did not contest the

[7] In an unreported jury instruction conference, the parties mutually agreed upon the instructions to be read to the jury. Petitioners raised no objections to these instructions, which they did not challenge on appeal.

meaning or importance of the admissions in their case-in-chief. Nor did they do so in post-trial motions. Instead, Petitioners ignored their admissions and simply argued Fogarty-Hardwick was not credible. Res. App. 137-138. The jury awarded Fogarty-Hardwick damages, and the court – being "taken aback" by the evidence it heard – issued an injunction. Pet. App. 13-15; Resp. App. 140-142.

5. Post-trial Proceedings:

Petitioners' did *not* complain in their post-trial motions that the pre-trial admissions were improperly used. Nor did they complain that this Court's ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994) barred the action. Instead, they asserted they should have been permitted to amend their answer to add the absolute-immunity defense. The court denied their motions, and they appealed. Pet. App. 15-16.

6. Proceedings on Appeal:

The Court of Appeal reversed the injunction, but affirmed the remainder of the judgment. The court held:

a) The December 2001 family court custody order – entered months after Fogarty-Hardwick filed suit – was *sui generis*. Thus, as a matter of state law, it could have no collateral estoppel or *res judicata*

impact on Fogarty-Hardwick's civil rights claims. Pet. App. 16-17.

b) The termination of the dependency case – by coerced agreement – was "*the product*" of the social services agents' misconduct and could not have a preclusive effect on Fogarty-Hardwick's civil rights case.[8] Pet. App. 18-25 ["We cannot engage in the kind of 'boot-strapping' that would allow the County to rely upon the outcome of the tainted dependency case as a basis to avoid liability for the very acts which tainted it."].

c) The numerous avenues to challenge a criminal conviction listed in *Heck* are not available in dependency cases, which are civil – not criminal – cases. Pet. App. 23, 26-27.

d) Petitioners failed to meet their burden on appeal to "identify and establish deficiencies in the evidence" by failing to "summarize the evidence . . . favorable and unfavorable and show how and why it is insufficient." Pet. App. 28-30.

e) Petitioners made no effort to demonstrate the trial court abused its discretion in

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[8] Vreeken threatened Fogarty-Hardwick, that she would never see her children again if she didn't submit to Vreeken's will. In response, Fogarty-Hardwick agreed to the terms of a "voluntary" case plan in exchange for the dismissal of the dependency case.

denying their motions regarding absolute-immunity and therefore waived the issue on appeal. Pet. App. 30-31 ["Having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it."].

f) Petitioners "once again failed" to meet their burden to summarize the evidence on point fairly. The County therefore waived its challenge to the evidence to support the existence of a policy or practice of condoning perjury in reports or testimony. Pet. App. 34-36 ["Under these circumstances, we have no choice but to conclude the County waived its claim of insufficiency of the evidence to support the existence of a policy."].

On appeal Petitioners relied heavily on matter outside the trial record, but their request for judicial notice was denied. Pet. App. 2, fn.2. Without disclosing the appellate court's denial of their request, Petitioners rely heavily on that material here.[9]

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[9] A good example of this tactic can be seen in Petitioners' description of the family court proceedings (Petition 15) where they cite "App. 85 [and] 86." Petitioners' Appendix, pages 72-91, were never introduced at trial or admitted into evidence. Petitioners' request for judicial notice on appeal was denied. Their arguments were properly rejected on appeal. *The Nippon Credit Bank v. 1333 North Cal. Boulevard*, 86 Cal. App. 4th 486, 499-500 (2001).

The Court of Appeal admonished Petitioners:

> The fact that a very well respected member of the superior court bench viewed the issuance of injunctive relief as necessary here highlights the egregiousness of defendants' conduct in this case. . . . The evidence at trial obviously caused both the jury *and the judge* to conclude not only that something seriously wrong was done to Fogarty-Hardwick in this case, but also that the wrongful conduct was *not an isolated incident*. Pet. App. 49-50.

Orange County continues to employ the same customs, practices, and tactics which the jury found to have caused Fogarty-Hardwick's damages. Resp. App. 190-191. This further underscores the appellate court's recognition that what happened to Fogarty-Hardwick was "*not an isolated incident*." Pet. App. 50.

7. California Courts Deny Rehearing and Review:

Petitioners petitioned for rehearing, complaining the court's finding of waiver seemed "unduly harsh." Rehearing was denied June 12, 2010. Petitioners then sought California Supreme Court review. That court unanimously denied review on September 29, 2010. Pet. App. 93.

REASONS FOR DENYING THE PETITION

Several fatal defects pervade the petition and underscore its lack of merit:

- Petitioners fail to affirmatively demonstrate this Court's jurisdiction to review the case;
- Petitioners fail to show that review is necessary or appropriate to secure uniformity in federal case law. The issues presented were decided on state law grounds, i.e., waiver for failing to follow proper appellate procedures, among other things;
- Petitioners essentially challenge the quantum of evidence, contrary to the Court of Appeal's finding that it was substantial and fully supported the judgment. In so doing, they ignore the evidence favorable to Fogarty-Hardwick as well as the strong presumptions supporting the appealed judgment.

A. The Court Lacks Jurisdiction to Hear The Matter.

Under 28 U.S.C. §1257(a) this Court has power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed under the Constitution or . . . statutes of . . . the United States." On review of a decision of a state's highest court, the Court has no jurisdiction to

consider a contention that was not raised and decided below.

This Court almost unfailingly refuses to consider any federal-law challenge to a state-court decision unless the federal claim was first properly presented to the state court that rendered the decision. *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). When the highest state court has failed to decide a federal question, it will be assumed the omission was due to lack of proper presentation in state courts, unless the aggrieved party can show the contrary. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 (1983); Supreme Court Rule 14(g)(i).

Petitioners fail to accurately describe the basis for the Court of Appeal's decision. The decision largely rests on their failure to designate an adequate record and/or adequately brief the issues on appeal. Moreover, other than as to the question of whether absolute-immunity was waived, Petitioners failed to bring their complaints to the trial court's attention – and thus waived them there – as opposed to on appeal, where their other waivers occurred.

1. Petitioners Failed to Properly Raise Their "Questions" in the Appellate Court.

Petitioners have failed to show their "federal claims" were properly raised or preserved. *See, e.g.*, Pet. App. 28-29 [failure to overcome presumption of correctness, failure to summarize the evidence fairly];

30-32 [failure to designate an adequate record, absolute-immunity defense was waived by failing to claim trial court decision was an abuse of discretion]; 34-36 [challenge to sufficiency of the evidence to support *Monell*[10] liability waived by County's failure to state facts fairly or argue position on appeal]; 39 ["The disproportionate argument concocted by the County is simply untrue and misleading"]; 41-42 [" . . . County gave new meaning to the word 'laconic' . . . "].

Petitioners are burdened with affirmatively demonstrating this Court's jurisdiction by presenting an adequate record to show the state court had a fair opportunity to address the federal question they seek to present. *Adams v. Robertson*, 520 U.S. 83, 87 (1997). To meet this burden, Petitioners must establish either that the claim was raised "at the time and in the manner required by state law," *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), or persuade the Court that the state procedural requirements could not serve as an independent and adequate state-law ground for the judgment. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982).

Without reference to the record or meaningful analysis of the trial evidence or opinion below, Petitioners conclude: "This court has jurisdiction under 28 U.S.C. Section 1257." Petition page 1. More is required.

The Court of Appeal expressly found Petitioners waived most of their questions presented by failing to

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[10] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

adhere to California's appellate procedures. Those issues that were not expressly found to have been waived on appeal were waived by Petitioners' failure to raise them by objection – or otherwise – in the trial court.

i. Petitioners Waived Their Absolute-Immunity Issue by Failing to Properly Challenge the Trial Court's Rulings on Appeal.

Petitioners claim the Court of Appeal held: "[T]he County waived the defense of absolute immunity by failing to plead it in its answer." *See* Petition 20, 34-35. Not so.

What the appellate court actually held is that Petitioners waived the absolute-immunity issue by not designating an adequate record and by failing to properly raise the issue on appeal.

> However, what the County does not do is acknowledge that the trial court deemed the absolute immunity defense to have been *waived* in the proceedings below. . . . And having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it.
>
> In particular, the County does not even *mention* in its opening brief on appeal that it failed to plead absolute immunity as a defense in its answer, or that it moved to add the defense to its answer only shortly before

> trial. We find it quite remarkable that [the] opening brief does not acknowledge that the court denied that motion as untimely, and that the County did not include that order as part of the record on appeal. . . . The County having failed to even claim, let alone establish, that ruling amounted to error, we must affirm the trial court's determination the defense of absolute immunity was waived. Pet. App. 30-32.

ii. Petitioners Waived All Their *Monell* Issues.

The appellate court also held Petitioners waived the *Monell* issues raised at pages 22-30 of their petition:

> [I]n asserting this claim, the County has once again failed to make any effort to satisfy its burden to summarize the evidence on the point, favorable and unfavorable, and show how and why it is insufficient. . . . Under these circumstances, we have no choice but to conclude that the County waived its claim of insufficiency of the evidence to support the existence of a policy. Pet. App. 35-36.

2. Petitioners Failed to Properly Preserve Their "Questions" in the Trial Court.

Under Supreme Court Rule 14(g)(i), where review of a state-court judgment is sought, as here,

petitioners must affirmatively show their objections were raised both in the trial and appellate courts. Petitioners must show "the method or manner of raising" those objections *and* "the way in which they were passed on by those courts." It is Petitioners' burden to provide the Court "with specific reference to the places in the record where the matter appears so as to show that the federal question was timely and properly raised." Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court, but also aids the Court in its deliberations by promoting the creation of an adequate factual and legal record. *Adams v. Robertson*, 520 U.S. 83, 90-91 (1997).

Petitioners can never meet their burden because they never objected in the trial court on *any* basis raised in their first three questions.[11] Having failed to raise the claim when its legal and factual premises could have been litigated, Petitioners cannot raise it now. *Muhammad v. Close*, 540 U.S. 749, 755 (2004).

i. Petitioners Failed to Preserve Objections Based on *Heck v. Humphrey*.

The decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) analogizes the burden of a plaintiff under 42 U.S.C. §1983 to that of a plaintiff in a malicious

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[11] As for question 4, Petitioners waived any challenge to the trial court's denial of absolute-immunity by failing to properly raise it on appeal, as noted above.

prosecution case. Petition page 33. As the Court of Appeal explained, the thrust of Fogarty-Hardwick's claims cannot be likened to a malicious prosecution action, or one for legal malpractice or wrongful conviction. At trial, Petitioners must have agreed; otherwise, they would have requested the jury instructions for malicious prosecution and/or abuse of process found at CACI 1500, 1501, and/or 1520. Resp. App. 174-178. If Petitioners found fault with the "causation" or "deliberate indifference" instructions, it was incumbent upon them to object or suggest clarifying instructions. They did not do so, and instead agreed to the instructions given. Petitioners also failed to offer instructions requiring Fogarty-Hardwick to prove her "factual innocence." Petitioners then raised no challenge to the instructions on appeal, and thus doubly waived any claim of error in them.

Petitioners never asserted to the trial court that *Heck v. Humphrey* barred the action or that the evidence presented was insufficient to support the verdicts. Their only complaint, as noted above, was that they should have been permitted to raise absolute-immunity as a defense. Based on this record, Petitioners cannot demonstrate question 3 was preserved (*i.e.*, whether *Heck v. Humphrey* applies to California juvenile dependency or family court orders).

ii. Petitioners Failed to Preserve Substantive Objections to Their Pre-trial Admissions.

Petitioners failed to interpose any objections – at all – to the requests for admissions, and failed to object when their admissions were read to the jury. Resp. App. 85-93. In closing argument, Petitioners again ignored their admissions. Resp. App. 137-138. They did the same in their post-trial motions. Petitioners now protest that their admissions didn't mean what they said, but they are in no position to complain. Petition pages 29-30.

There was ample opportunity before, during, and after trial for Petitioners to object to their admissions, or to counter the obvious impact of those admissions by introducing explanatory or controverting evidence, yet they failed to do so.

a. Petitioners' Authorities Do Not Apply.

Waiver aside, on the merits, in *Hudson v. City of N. Las Vegas*, No. 2:04-CV-01518, 2007 U.S. Dist. LEXIS 2377 (D. Nev. Jan. 4, 2007), the trial court found the plaintiffs' constitutional rights had not been violated: "The Court already has concluded Defendant officers did not violate Hudson's Fourth Amendment rights, therefore Hudson's municipality claim fails because he has not demonstrated a constitutional violation." *Id.* at 22. The fact that the municipality "admitted" its officers' conduct comported with

policy was unimportant because those policies were not unlawful.

In *Copper v. City of Fargo*, 905 F.Supp. 703 (D. N.D. 1995), the district court did not find the plaintiff's requests for admissions were improper, contrary to Petitioners' claim. Rather, under the specific facts in *Copper*, and in conjunction with other evidence, the trial court concluded "that municipal liability premised on a ratification theory does not flow from the City's admissions." *Id.*

By contrast, Vreeken and Dwojak admitted their conduct comported with County policy. Resp. App. 87-92. Dwojak knew what those policies were – she was responsible for training other agents about them. Resp. App. 62-64, 68. Dwojak also testified that, pursuant to County policy, agents were permitted to make allegations against parents in juvenile dependency petitions when they knew there was no supporting evidence at all. Resp. App. 71. She also testified that there was no limitation on the extent of unsupportable allegations agents were permitted to make. Resp. App. 72. When Petitioners admitted they followed policy in the treatment of Fogarty-Hardwick, they knew the allegations leveled against them. They also knew what actually happened in February 2000, and after. Resp. App. 18-19, 21-31, 62-77, 107-109, 120-128.

b. Petitioners Ignore Important Distinctions Between Federal and State Law Governing Pre-Trial Admissions.

Under federal law, responses to RFAs need not be verified under penalty of perjury. *See* FRCP Rule 36. The opposite is true under California law. *See* C.C.P. §§2033.210-2033.250. Verifying the responses is, in effect, a declaration that the party has disclosed all information available to her. *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 782 (1978)

California requires the responding party to undertake a "good faith" and reasonable investigation in formulating answers to RFAs. *See* C.C.P. §2033.220(c); *Chodos v. Superior Court*, 215 Cal. App. 2d 318, 322 (1963). Moreover, an admission may be amended or withdrawn upon noticed motion. C.C.P. §2033.300(a); *Valerio v. Andrew Youngquist Construction*, 103 Cal. App. 4th 1264, 1272 (2002). Leave to do so is liberally granted where the trial court finds the admission was (1) the result of "mistake, inadvertence, or excusable neglect;" and (2) there is no prejudice to the party who propounded the request. C.C.P. §2033.300(b); *New Albertsons, Inc. v. Superior Court*, 168 Cal. App. 4th 1403, 1418 (2008).

The trial court retains discretion to determine the scope and effect of a party's admission. For example, the court – if asked – may determine whether an admission accurately reflects the truth in light of other evidence in the case. This prevents RFAs from

being misused as a device to hide or confuse issues. *Fredericks v. Konots Industries, Inc.*, 189 Cal. App. 3d 272, 278 (1987). Even after the Petitioners' responses were read to the jury, they made no effort whatsoever to request that the trial judge intervene and restrict the application of their admissions. Thus, they waived any claimed defect in the requests or responses.

iii. Petitioners Failed to Preserve Their "Single Incident/Causation" Arguments Raised in Question 1.

In essence, Petitioners complain that the evidence adduced at trial was insufficient to support the verdict. But, Petitioners do not claim verdict form #5 was erroneous, nor could they. Pet. App. 64-65. It was a stipulated form. Similarly, as noted above, Orange County agreed to the jury instructions on deliberate indifference and failure to supervise its agents. *See supra*, note 7.

The trial court read the following to the jury:

> Ms. Fogarty-Hardwick claims that she was deprived of her civil rights as a result of the Orange County social services agency's failure to train and/or supervise its employees. To establish this claim, Plaintiff must prove all of the following:
>
> Number one, that the Orange County social services agency's training program was not adequate to train its employees properly to handle usual and recurring situations

and/or its social workers were not adequately supervised in their handling of usual and recurring situations;

Number two, that the Orange County social services agency was deliberately indifferent to the need to train and/or supervise its employees adequately;

Number three, that the failure to provide proper training and/or supervision was the cause of the deprivation of Ms. Fogarty-Hardwick's right to the care and custody of her children or her right of privacy. . . .

Number four, that Ms. Fogarty-Hardwick was harmed; and,

Number five, that Orange County social services agency's failure to train and/or supervise its employees was a substantial factor in causing the Plaintiff's harm. . . .

Deliberate indifference is the knowing or reckless disregard of the consequence of one's acts or omissions. To establish deliberate indifference, Ms. Fogarty-Hardwick must prove that the Orange County social services agency knew or should have known that its failure to provide reasonable training and/or supervision would likely result in a violation of the right to familial association or the right to privacy of Ms. Fogarty-Hardwick. Resp. App. 130-137.

Petitioners offered no clarifying instructions further defining "deliberate indifference" or the type

of evidence necessary to prove it. Under California procedural rules, the "trial court is not obligated to seek out theories [Petitioners] might have advanced, or to articulate" for them that which they have "left unspoken." *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686 (1992). Petitioners are precluded from arguing their stipulated instructions were too general or incomplete, unless they requested a clarifying instruction. *Metcalf v. County of San Joaquin*, 42 Cal. 4th 1121, 1130-1131 (2008). No "clarifying" instruction was requested.

Moreover, at no point in their post-trial motions did Petitioners assert the evidence admitted to prove their deliberate indifference was insufficient. Thus, Petitioners again doubly waived the issue.

B. Petitioners Fail to Show That Review Is Necessary or Appropriate to Secure Uniformity in Federal Case Law or to Decide Any Important Questions of Federal Law.

The unpublished appellate opinion has no national or institutional impact. Petitioners do not contend the Court of Appeal's unpublished opinion creates any conflict or lack of uniformity among the federal district courts, nor could they. *See* Resp. App. 180-181 ["case is non-precedented" and "will not have a legal impact beyond the parties." *Id.*].

As Petitioners' counsel averred, the opinion binds only the parties to this action and presents no

important question of federal – or any other – law. All issues raised here were resolved either on an express finding of waiver on appeal or a determination that substantial evidence supports the verdict. Petitioners have never claimed error in the jury instructions. A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See, e.g.,* Supreme Court Rule 10. The Court should deny the Petition because it simply raises impermissible challenges to the sufficiency of the evidence, which were waived below.

C. The Appeal Was Correctly Decided and *Connick v. Thompson* is Factually Distinguishable.

Petitioners urge this Court to vacate the appellate decision under principals yet to be announced in *Connick*. Petition page 22. Their request should be denied. *Connick* revolved around a single case of misconduct; Fogarty-Hardwick's case did not.

1. The Facts of *Connick*.

i. The Plaintiff's Case in *Connick* Was Based on Lack of Training and a *Brady* Violation in a Single Case.

The facts in *Connick* are somewhat convoluted. John Thompson was convicted of an attempted armed robbery, but was actually innocent. Attorneys in the

Orleans Parish District Attorney's Office used the conviction to secure Thompson's conviction in an unrelated murder case. Eighteen years later, Thompson uncovered exculpatory evidence that cleared him of the armed robbery charge. Thompson was found not guilty when he was retried for the murder. He sued.

The jury determined the DA's Office was deliberately indifferent to the need to train, monitor, and supervise its attorneys on *Brady*[12] principles. In *Connick*, there was no evidence that the suppression of blood evidence had occurred in any other case. But several prosecutors in that case withheld the same evidence at different times. The district court, apparently after spirited argument, crafted its jury instructions and ruled that Thompson need prove no pattern. The jury was thus asked whether a *Brady* decision "involved a difficult choice or one that prosecutors had a history of mishandling." This allowed it to find the office deliberately indifferent to training based on a single violation.

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[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

ii. Fogarty-Hardwick's Case Was Based on Inadequate Supervision, an Admitted Policy of Making Baseless Allegations, and an Admitted Lack of Policies Designed To Bring Social Workers Into Compliance with Statutory Requirements.

Petitioners complaint that Fogarty-Hardwick's verdict was based on a "single instance" of misconduct, as opposed to a pattern or practice, ignores the evidence and the findings made by the jury and appellate court, i.e. that what Petitioners did to Fogarty-Hardwick "*was not an isolated incident.*" Pet. App. 50; Resp. App. 190-191. Their protest that Fogarty-Hardwick was not harmed by their filing and pursuit of knowingly baseless allegations is also particularly baseless. Petition page 23. In taking this approach, Petitioners again ignore the evidence. Resp. App. 40-44

Unlike *Connick*, in Fogarty-Hardwick's case there was substantial evidence to suggest the County had notice of the misconduct of its agents, yet was deliberately indifferent to the need to supervise them. Pet. App. 9-10; Resp. App. 62-65, 69-70, 74-75, 77, 146-151, 152-164. Moreover, other substantial evidence showed there was: (1) an agency policy of charging the non-abusing parent with failure to protect the child even when it knew there was no evidence to support the charge; Resp. App. 15-16, 18-19, 22-27, 62-64, 74-75, 79-85; (2) a policy of not

allowing parents to be present when their children were interrogated; Resp. App. 27-28, 91-92; and, that Dwojak did not care about what truly happened on February 15, 2000, i.e., she didn't care if her workers lied and fabricated evidence to submit to the juvenile court. Resp. App. 67-70.

Petitioners fail to address or explain the highly damaging testimony of Dr. London, who was important to Fogarty-Hardwick's proof of the *Monell* claims. Resp. App. 33-40, 45-52. London testified about the nature of what he termed an "agency" case, i.e., a case where the entire agency banded together against Fogarty-Hardwick. He further testified that Petitioners' conduct demonstrated the County's regularly-established policies, customs, and practices with regard to the training and supervision of its social services agents. London also testified about how the lack of adequate supervision and training caused the violation of Fogarty-Hardwick's civil rights. *Id.* This type of evidence was not present at trial in *Connick*.

iii. Government Code §820.21 Put All California Counties on Notice of the Pervasive Nature of the Misconduct it Addresses – No Such Statute Existed in *Connick*.

At trial, Vreeken admitted that in 50% of the cases parents complain about social worker perjury. Resp. App. 124-125. Yet, in twenty years, no social

worker had been disciplined for making false allegations against a parent. Resp. App. 113, 117-118. SSA Director Lawrence Leaman testified he never promulgated any policies requiring his agents to disclose exculpatory evidence, in spite of his admission they had a duty to do so. Resp. App. 109-113. Only after this lawsuit was filed did Orange County promulgate a policy to restrain the conduct of its workers and bring them in line with then existing law. Resp. App. 113-116. This is another important distinction between this case and *Connick*. Petitioners complain that "lay persons daily confront the obligation to tell the truth." Petition page 25. They go on to suggest their conduct cannot possibly form the basis for "failure to train" liability. Petition page 25. The good nature of "lay persons" is irrelevant.

In 1995, the California Legislature – reacting to public outcry – enacted Government Code section 820.21. Resp. App. 170-173. Section 820.21 specifically addresses perjury, fabricating evidence, suppressing exculpatory evidence, and using undue influence to obtain evidence by social services agents. Resp. App. 167 ["The child protection system is designed to protect children from abusive parents, but who protects children from the abuses of the system?"]. If it were true that social service agents were adequately restrained by common sense and moral obligation, there would have been no need for this legislation in 1995 – five years before Petitioners and Fogarty-Hardwick crossed paths. Resp. App. 171 ["Currently there does not exist any effective check upon the

arbitrary power or absolute immunity of social workers. Such a situation is antithetical to the American political philosophy and history of accountable government power."].

Petitioners complain "to the extent the California Court of Appeal's affirmance *sub silentio* relies on a failure to train, it completely negates any distinction between municipal and vicarious liability." Petition 24. Petitioners' focus on "inadequate training" mischaracterizes the evidence admitted at trial. The Court of Appeal did not rely on "training" at all. Pet. App. 11 (" . . . the County failed to supervise, control, or direct the conduct of its social workers."). Fogarty-Hardwick proved it was Orange County's inadequate supervision and deliberate indifference to the need for a policy to curb social worker misconduct that caused her harm. Pet. App. 34, 39, fns.12, 50. Petitioners' attack on Fogarty-Hardwick's proof of "inadequate training" is a red herring, and fails to impugn the underlying judgment or the substantial evidence that supports it.

It is true that the jury instructions included both "inadequate training and/or supervision," – which is disjunctive. However, the focus of the evidence presented at trial and argued to the jury was squarely on Orange County's lack of any policy designed to prevent the proven conduct of its agents, and the utter lack of supervision to prevent their wrongful conduct. Resp. App. 109-118.

2. Orange County's Persistent Failure to Adopt Policies and Procedures to Prevent the Conduct Proscribed by Government Code §820.21 is Evidence of Its Deliberate Indifference to Fogarty-Hardwick's Constitutional Rights.

Petitioners put their own spin on the testimony of Susan Holl, who was most knowledgeable about SSA's policies and practices used against Fogarty-Hardwick. Petitioners ignore the fact that, in February 2000, Orange County had no policy prohibiting its social services agents from lying, fabricating evidence, suppressing exculpatory evidence, or exercising undue influence to obtain evidence. Resp. App. 116-117.[13]

They do the same with regard to Lawrence Leaman's testimony. Despite his knowledge about the "hot button" issue of parents' rights, and the fact that his agency's practices were under scrutiny, he never promulgated policies to require disclosure of exculpatory evidence. Resp. App. 111-113.

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[13] As an interesting anecdote, in an amicus brief filed by The California Association of Counties in support of Orange County on appeal, it was conceded that allegations of social worker perjury are "ubiquitous." Thus, it can hardly be said that counties don't "know" what their workers are doing. The Legislature knew in 1995 – and acted. Its voice simply fell on deaf ears.

Municipalities cannot insulate themselves from liability by delegating their policymaking authority. *See, e.g., St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988). The authority to make municipal policy is necessarily the authority to make final policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-484 (1986). Thus, it makes sense that, where a municipality fails to promulgate policies to protect constitutional rights under a regularly-occurring set of circumstances, and evidence is presented at trial to suggest that the violative conduct occurs in a significant percentage of the cases that regularly come before the agency, the persistent failure to adopt a departmental policy governing the alleged misconduct, or to implement rules and regulations regarding it demonstrates a "deliberate indifference" to constitutional rights. *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994), cert. den., Feb. 21, 1995; *see also Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. Ill. 2009), cert. den., Nov. 29, 2010.

3. Petitioners Ignore the Importance of Government Code §820.21.

Petitioners complain: "[A]t the time of the social workers' alleged actions, no law required counties to train their social workers to disclose exculpatory evidence." Petition page 24. Not so – California Government Code §820.21 does. While §820.21 does not explicitly require counties to train their workers, it certainly puts them on notice that without appropriate policies, training, and supervision their workers will

be personally liable for damages. By logical extension, those counties that knowingly elect to remain indifferent to the law will also incur liability for failure to promulgate policies to bring their workers into line with it. *Butz v. Economou*, 438 U.S. 478, 506 (1978).

Petitioners pose the question: "What training could or would assist in ensuring that social workers tell the truth?" Petitioners seem ignorant of their own policies. As noted, Susan Holl testified that policies were finally promulgated in July 2001, within months after Fogarty-Hardwick filed suit, to "provide guidelines for assuring the rights of C.F.S. clients as mandated by state and federal civil rights laws." Orange County's Policy #A-0309 is a nearly verbatim restatement of Government Code §820.21. Yet, in Holl's twenty years of experience working for the SSA, she never heard of a social worker being disciplined for making false statements in a court report, fabricating evidence, or suppressing exculpatory evidence. Resp. App. 117-118. Despite complaints coming from many sources, the County never investigated whether or not the misconduct Fogarty-Hardwick complained of occurred. Even after Fogarty-Hardwick filed suit, Vreeken was promoted to supervisor, not disciplined. Pet. App. 10; Resp. App. 58-60, 64-65, 103-107, 146-164.

D. *Heck v. Humphrey* Should Not Bar This Action.

Petitioners misconstrue *Heck v. Humphrey*, and would have this Court extend it beyond its natural boundaries and purpose. *Heck v. Humphrey*'s favorable-termination rule was intended to prevent a person in custody from using §1983 to circumvent the more stringent requirements for habeas corpus. *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005). Petitioners' argument is flawed.

First, it is based on evidence never admitted at trial, i.e., the family court order. Petition page 33; Pet. App. 72-91. As noted above, judicial notice of this order was denied, and it is therefore patently inappropriate to present it here, especially without revealing its status to this Court.

Second, the "detention order" by which SSA obtained court authorization to remove Fogarty-Hardwick's children was not appealable. The dispositional order is the first appealable order in dependency cases. *See, e.g., In re Melvin A.*, 82 Cal. App. 4th 1243, 1250 (2000). There was no dispositional order in this case. As such, there was nothing to appeal.

The third flaw was aptly pointed out in the Court of Appeal's opinion:

> [T]he numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for "expungement" of a dependency dispositional

> order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention) we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding.[14]

Pet. App. 27.

The fourth flaw arises by statute. As a matter of California law, an order adjudging a minor a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding. California Welfare and Institutions Code §203; *see also In re James F.*, 42 Cal. 4th 901, 915 (2008) ("The rights and protections afforded parents in a dependency proceeding are not the same as those afforded to the accused in a criminal proceeding.").

Petitioners' reliance on *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1138-1140 (9th Cir. 2005) for the proposition that federal courts are willing to extend *Heck* beyond its traditional boundaries to civil proceedings is misleading. Petition page 32. There, the court likened the civil commitment proceeding of a convicted rapist to the sentence a prisoner might serve after being convicted. The analogy simply

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[14] As a general rule, release of the detained individual would render a request for habeas corpus relief moot. *In re Stinnette*, 94 Cal. App. 3d 800, 803 (1979).

cannot be stretched to cover the temporary detention of a minor in juvenile dependency proceedings.

E. The Court of Appeal Did Not Err in Finding Petitioners Failed to Properly Challenge the Trial Court's Denial of Absolute-Immunity on Appeal.

Petitioners again misstate the Court of Appeal's decision and improperly rely on *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 858 (2009), for the proposition that absolute-immunity extends to "police officers and social workers." Petition page 34. *Van de Kamp* does not apply: "We here consider the scope of a prosecutor's absolute immunity . . . " *Id.* Social workers are not prosecutors. *See, e.g., Hoffman v. Harris*, 511 U.S. 1060 (1994); *see also* Cal. Gov. Code §820.21.

Misstatements aside, federal pleading procedures do not apply in state courts. Here, petitioners failed to allege the defense of absolute-immunity. When they moved for summary judgment on that basis, the trial court properly denied their motion because the defense was not alleged in the answer. *See FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 382 (1991); *see also Government Employees Ins. Co. v. Superior Court*, 79 Cal. App. 4th 95, 98 (2000). When they failed to timely seek leave to amend, it was within the discretion of the trial court to deny the motion. *Record v. Reason*, 73 Cal. App. 4th 472, 487 (1999). Regardless, the issue was waived on appeal by Petitioners' failure to designate an adequate record. Pet. App. 30-32.

CONCLUSION

Petitioners have failed to make the threshold jurisdictional showing that is required. They have also failed to show there is any important question of federal law this Court should decide. This case involves a very fact-specific situation where it was proven that SSA agents' wrongful acts were consistent with the County's regularly-established customs, practices, and policies. Nothing in the Court of Appeal's unanimous unpublished opinion warrants review. This decade-long battle should be finally put to rest. The petition should be denied.

Respectfully submitted,

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Appellant, v. COUNTY OF ORANGE et al., Defendants and Respondents.	G030302 (Super. Ct. No. 01 CCO2379) OPINION

Appeal from a judgment of the Superior Court of Orange County, Stephen J. Sundvold, Judge. Reversed.

Shumate & Associates and Mary D. Shumate for Plaintiff and Appellant.

Beam, Brobeck & West, Bryron J. Beam and Glen A. Stebens for Defendants and Respondents.

Deanna Fogarty-Hardwick (Hardwick) appeals from a judgment that dismissed her tort and civil rights action against the County of Orange, the Orange County Social Services Agency (SSA), and several social workers (collectively, the County, unless otherwise indicated), after the trial court sustained a general demurrer without leave to amend. Hardwick argues the complaint states a cause of action. We conclude the demurrer was properly sustained as to the tort claim, but not the civil rights claims, and so we reverse.

* * *

This action arises out of a juvenile dependency case filed by SSA. After the dependency petition was dismissed by stipulation of the parties, Hardwick commenced the present suit. At issue is the sufficiency of her second amended complaint, which sets out causes of action for intentional infliction of emotional distress, federal civil rights violations (under 42 U.S.C. § 1983), and an injunction.

Hardwick alleges social workers used "intentionally fabricated evidence" to obtain a court order to detain her two daughters on February 17, 2000. The nature of this fabrication is not made clear.

SSA filed an amended dependency petition on February 23, 2000. Hardwick alleges SSA maliciously failed to include exculpatory information, and it filed a false report related to the amended petition. The amendment added an allegation that a social worker overheard Hardwick tell her children something –

what is not said – that caused them to fear their father and refuse to visit him. Hardwick alleges SSA failed to include in the amended petition "exculpatory information . . . that . . . Vreeken [a social worker] was actually the individual who told the children they would be taken away from their mother and placed in a foster care home if they continued to refuse to visit with their father." She also alleges SSA submitted a report to the juvenile court, on the day the amended petition was filed, that "contained intentional false statements of [Hardwick's] conduct, knowing the statements were maliciously false. . . ." The statements in question are not identified.

Another allegation of withholding exculpatory evidence concerns a March 31, 2000 letter to SSA from the children's therapist. The therapist said the children were not doing well in foster care. Testifying at a hearing that day (about what is not revealed in our record), Vreeken said nothing about the letter, acting on instructions from a supervisor. The supervisor, present in court with the letter, failed to reveal it to the court or Hardwick. According to the complaint, both social workers acted "with malice and with conscious disregard of the parental rights of [Hardwick]."

Hardwick also makes several conclusory allegations of perjury. At a March 1, 2000 hearing, SSA "misrepresent[ed] to the court that [the] children were doing well," when in fact they were emotionally depressed and physically ill. On March 29, 2000, Vreeken was "committing perjury by again repeating

the false statements regarding [Hardwick's] conduct on February 13, 2000. . . ."[1] On April 4, 2000, Vreeken "committed perjury, denying that she had made any prior statements regarding the fact that she had expressed concerns for the minor children's well being."

The emotional distress claim (the first cause of action) does not contend the defendants intended to cause Hardwick emotional distress, but rather that they acted intentionally and emotional distress resulted. Alternatively, Hardwick alleges the defendants acted with a willful and conscious disregard of her parental rights, and this conduct caused emotional distress.

There are two civil rights claims. One (the second cause of action) alleges social workers removed the children without cause, and continued to detain them without cause, violating Hardwick's right to familial association and right to be free from unreasonable search and seizure, The facts alleged are as set out above, with Hardwick asserting the various misrepresentations between February 17 and April 4, 2000, were made to detain the children and continue their detention.

The other civil rights claim (the third cause of action) alleges SSA and the County established

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[1] The reference to February 13, 2000, is unclear, since the complaint does not say what is supposed to have happened on that day.

policies that violated Hardwick's constitutional rights under the fourth and fourteenth amendments. These policies pertained to detaining children without a finding of imminent danger of serious physical injury; interviewing children without a parent present; continuing detention after learning there is no basis to do so; using trickery and fabricated evidence; and failing to adequately train employees regarding the constitutional rights of parents. This claim again rests on the events of February 17 to April 4, 2000, which are said to show improper removal of the children and wrongful continuation of detention. An injunction is requested (the fourth cause of action) to restrain defendants from continuing to pursue these unlawful policies.

The trial court sustained the demurrer without leave to amend on the grounds that SSA's actions were protected by governmental immunity under state law or, alternatively, the action was barred by collateral estoppel.[2] On the immunity issue, the judge ruled Hardwick failed to state a cause of action under Government Code section 820.21,[3] which provides that juvenile court social workers have no immunity

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[2] The trial judge's reference to collateral estoppel indicates he gave some credence to the County's argument chat Hardwick sought to relitigate court orders issued in the dependency matter. On this appeal, the County does not argue collateral estoppel supports the ruling sustaining the demurrer.

[3] All further statutory references are to the Government Code.

if acting with malice, they commit perjury, fabricate evidence, or withhold exculpatory evidence. He found the allegations of malice insufficient to come within this statutory exception to governmental immunity. The federal civil rights claims were not addressed. We view the tort claim somewhat differently than the trial court, yet we come to the same result. But that has no bearing on the civil rights claims, as to which the demurrer should have been overruled.

I

The problem with the emotional distress claim is not malice, which is adequately alleged, but the failure to set out a prima facie case of intentional infliction of emotional distress. So the demurrer to this cause of action must be sustained.[4]

The elements of intentional infliction of emotional distress are: (1) extreme or outrageous conduct engaged in with the intent of causing, or reckless disregard of the probability of causing, emotional distress; (2) severe emotional distress; and (3) causation. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

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[4] The failure to allege a prima facie case was first raised by the County in its appellate brief, which is permissible. A litigant may raise a new theory on appeal if it presents a pure question of law on undisputed facts (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259), as is the case here.

Here, Hardwick fails to allege the necessary intent. She claims defendants' acts were intentional, and undertaken with willful disregard of her parental rights, but neither suffices. More than intentional conduct is required – the essence of the tort is an *intent to cause emotional distress*. Likewise, it is not enough to assert a willful disregard of Hardwick's parental rights – it is a disregard of the *risk of causing emotional distress* that makes out the claim. Since actionable intent is missing, the cause of action fails.

Hardwick argues the complaint is sufficient because it alleges the defendants acted knowingly, with malice, and caused her to suffer emotional distress. Unfortunately, this fails to grasp the problem. As we have said, it is not enough to allege intentional conduct and resulting emotional distress. What is required is an *intent to cause* emotional distress or reckless disregard for that likelihood. Hardwick makes no such allegation, so we have no alternative but to affirm the ruling sustaining the demurrer to this cause of action.[5]

II

We briefly address Hardwick's argument that the allegations of malicious conduct are sufficient to

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[5] In her brief, Hardwick argues she should be given leave to amend if the allegations of malice are insufficient, claiming that defect can be cured. But no such claim is made regarding the intent element – which is the problem here.

permit suit against the social workers under section 820.21. She is right as far as governmental immunity is concerned, but that cannot save the tort claim.

The statute in question provides as follows: "Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to . . . the Welfare and Institutions Code [sections 200 to 987] shall not extend to any of the following, if committed with malice: [¶] (1) Perjury. [¶] (2) Fabrication of evidence. [¶] (3) Failure to disclose known exculpatory evidence. [¶] (4) Obtaining testimony by duress. . . ." (§ 820.21, subd. (a).) As used in this section, malice is defined as "conduct that is intended . . . to cause injury to the plaintiff or despicable conduct that is carried on . . . with a willful and conscious disregard of the rights or safety of others." (§ 820.21, subd. (b).)

The tort claim adequately alleges malice for purposes of permitting suit against the social workers. Hardwick alleges social workers twice failed to disclose exculpatory evidence (the social workers' comment to the children and the therapist's letter), and they did so with a willful and conscious disregard of Hardwick's parental rights. The latter tracks the second prong of the definition of malice set out in section 820.21, subdivision (b), so it is sufficient to come with the statute. But getting around governmental immunity does not mean there is a tort cause of action. The fundamental problem remains – the

complaint fails to state facts sufficient to constitute a cause of action for intentional infliction of emotional distress.

We cannot end our discussion of this issue without addressing the County's argument that section 820.21 should not apply because it contradicts the general governmental immunity statutes that would otherwise protect the social workers. The argument consists of nothing more than the naked assertion section 820.21 should not apply, unsupported by either authority or explanation. That hardly makes the case, particularly in the face of the provision in section 820.21 that it applies "notwithstanding any other provision of the law."

III

We invited the parties to submit supplemental briefs on the issue of whether the civil rights claims state a cause of action, and both did so. The County argues the claims under 42 U.S.C. section 1983 are barred by the statute of limitations, they are not pled with sufficient specificity, and there is no threat of future harm that would warrant an injunction. We are not persuaded, so we reverse the judgment as to these causes of action.

Claims under 42 U.S.C. section 1983 are subject to the personal injury limitations period of the forum state, there being no applicable federal statute of limitations. (*Wilson v. Garcia* (1985) 471 U.S. 261, 276.) At the time this action was filed in 2000,

California's personal injury statute of limitations was one year. (Code Civ. Proc., § 340, subd. (3), deleted by Stats. 2002, ch. 448, § 3.)[6]

This action was brought within the statute of limitations. It was commenced on February 15, 2001, just in time, since the facts allege misconduct beginning with the detention on February 17, 2000. The pleading before us is the second amended complaint, filed in September 2001. It seeks recovery on the same general facts as the original complaint (the events of February 17, 2000 to April 4, 2000), so it relates back to the filing of the original complaint for purposes of the statute of limitations. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.)

The County's argument is the civil rights claims initially appeared in a June 2001 first amended complaint. But this is not quite accurate. The original complaint contains a section 1983 cause of action for wrongful removal of the children, and another for failure to adequately train county employees regarding the constitutional rights of parents. Be that as it may, it is not the causes of action pleaded, but the facts upon which they are based, that matters for purposes of relation back. The County does not deny the facts behind the present civil rights claims are

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[6] The personal injury statute of limitations is now two years. (Code Civ. Proc., § 335.1. added by Stats. 2002, ch. 448, § 2.)

the same as those set out in the original complaint, nor does it contest the timeliness of that pleading. So there is no statute of limitations problem.

Nor is there anything to the three specificity arguments offered by the County. First, the County claims state pleading requirements govern, section 1983 claims filed in state court, so the "basis . . . and determination" of the alleged offending policy must be specifically pled. The argument relies on *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, but the case is irrelevant since it does not involve any federal claims, and we are presented no other authority for this position.

Second, the County argues the second amended complaint is defective because it fails to "prove that the execution of a policy, custom or practice by the County of Orange resulted in the deprivation of a constitutional right." This seems to reflect a misunderstanding of procedure, since proof is not required at the pleading stage. The only question before us is whether the complaint is sufficient to withstand a demurrer. The complaint does allege deprivation of constitutional rights by virtue of a County policy, and that is sufficient for pleading purposes.

The third specificity argument is that the County cannot be held vicariously liable for the acts of its employees. But that is not correct. While a local government is not liable as a matter of respondeat superior for injuries caused solely by its employees or agents, it is responsible for harm caused by

employees carrying out a local government policy or custom. (*Monell v. Dept. of Soc. Serv. of City of N.Y.* (1978) 436 U.S. 658, 694.) Just such a policy is alleged here, so there is a theoretical possibility of liability. The complaint is not deficient for lack of specificity.

The county also argued, in its original brief, that the federal claims are barred because social workers enjoy absolute immunity under federal law. However, it did not raise that point in its supplemental brief, undoubtedly because of the recent en banc decision in *Miller v. Gammie* (9th Cir.) 335 F.3d 889. *Miller* reversed an earlier panel decision relied on by the County, and holds that social workers have absolute immunity only for the quasi-prosecutorial decision to institute dependency proceedings. Beyond that, the burden is on a social worker defendant to show that other functions he or she performed are similar to conduct accorded absolute prosecutorial immunity at common law. (*Id.* at p. 898.)

In this case, the social worker defendants include not only those alleged to have instituted the dependency action, but also others alleged to have participated in subsequent events. Since the latter do not appear to be entitled to absolute immunity, the demurrer to the federal claims cannot be sustained on this ground. We leave it to the trial court to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion.

As for the injunction, the County argues there is no threat of future harm, so no basis upon which an injunction might issue. At this stage of the case, however, we cannot parse the remedies sought in order to determine the propriety of an injunction. That is a matter for the trial court if and when one is sought.

Since the civil rights claims are sufficient to state a cause of action, the demurrer to the complaint should have been overruled as to these claims – the second, third, and fourth causes of actions. The judgment is reversed as to these. Appellant is entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 15, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[130] DEANNA RAE FOGARTY-HARDWICK,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[198] Q NOW, DID MS. DAVIS – DID MS. DAVIS EVER EXPLAIN TO YOU THAT YOU WERE ALSO POTENTIALLY A TARGET FOR FAILURE TO PROTECT YOUR CHILDREN?

* * *

THE WITNESS: I BELIEVE WE HAD A CONVERSATION – EXCUSE ME. I BELIEVE I HAD ASKED HER FOR CLARIFICATION OF WHY I WAS – I HAD BEEN CHARGED WITH FAILURE TO PROTECT. AND AS I RECALL, SHE SAID IT WAS PROTOCOL IN THESE SITUATIONS;

* * *

BY MR. MCMILLAN:

Q JUST SO THAT I'M CLEAR, WHAT SHE EXPLAINED TO YOU IS THAT IT WAS REALLY JUST A FORMALITY?

A THAT IS HOW SHE EXPLAINED IT TO ME.

[199] Q SOMETHING THAT WAS DONE AS A MATTER OF COURSE?

A THAT'S CORRECT.

Q DID SHE TELL YOU AT THAT POINT THAT WHEN THEY FILED THE PETITION THEY HAD SOME EVIDENCE TO SUGGEST THAT YOU HAD FAILED TO PROTECT YOUR DAUGHTER KENDALL?

* * *

THE WITNESS: NO, SHE DIDN'T.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 22, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[590] RACHEL DAVIS,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[628] Q DID YOU OBSERVE DEANNA TO BE AN AFFECTIONATE PARENT?

A AS FAR AS I COULD SEE, YES.

Q DID YOU ALSO INTERVIEW DEANNA IN THIS CASE ABOUT DISPOSITION OF THE CASE?

A YES, I DID.

Q WAS THE MEETING ALSO FOR THE PURPOSE OF REVIEWING THE PETITION AND FINDING OUT WHAT SHE BELIEVED WAS TRUE AND WAS NOT TRUE?

A YES.

Q AS YOU SIT HERE TODAY, CAN YOU TELL ME ANY INFORMATION THAT YOU HAD THAT DEANNA EVER FAILED TO SUPERVISE EITHER KENDALL OR PRESLIE?

* * *

THE WITNESS: NO.

BY MS. SUTHERLAND:

Q DO YOU HAVE ANY REASON TO BELIEVE SHE KNEW THE FATHER WAS ABUSING THE CHILDREN AND IGNORED THE. INFORMATION OR THAT SHE IN ANY OTHER WAY FAILED TO PROTECT THE GIRLS?

A NO.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 23, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[801] (THE DEPOSITION TESTIMONY OF ELAINE WILKINS WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[818] "ARE YOU AWARE OF ANY EVIDENCE THAT EXISTED AS OF NOVEMBER 16, 1999, TO SUPPORT THE ALLEGATION THAT DEANNA KNEW HER CHILD KENDALL WAS AT RISK OF HARM AND FAILED TO PROTECT HER?

"ANSWER: NO, I DO NOT."

* * *

[839] "QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA WAS NOT A FIT AND PROPER PARENT FOR HER DAUGHTERS WHEN THEY WERE REMOVED FROM HER CARE ON [840] FEBRUARY 17, 2000?

"ANSWER: NO.

"QUESTION: DID YOU HAVE ANY REASON TO BELIEVE KENDALL AND/OR PRESLIE WERE IN IMMINENT DANGER OF SERIOUS PHYSICAL INJURY IN THEIR MOTHER'S CARE AS OF FEBRUARY 17, 2000?

"ANSWER: NO."

* * *

[841] "QUESTION: OKAY. AS FAR AS YOU ARE AWARE, WAS THE MANNER IN WHICH YOU

CONDUCTED YOURSELF IN THIS CASE CONSISTENT WITH THE POLICIES AND PRACTICES OF ORANGE COUNTY SOCIAL SERVICES AGENCY?

"ANSWER: YES."

THE COURT: THANK YOU VERY MUCH, MR. MCMILLAN.

* * *

[883] (THE DEPOSITION TESTIMONY OF MARCIE VREEKEN WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[896] "QUESTION: AND IN THIS CASE YOU'RE NOT AWARE OF ANY EVIDENCE THAT DEANNA EVER SEXUALLY OR OTHERWISE ABUSED HER CHILDREN, ARE YOU?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA KNEW HER CHILD KENDALL WAS AT RISK OF HARM AND FAILED TO PROTECT HER?

[897] "ANSWER: NO.

* * *

[901] "QUESTION: NOW, YOU'RE NOT AWARE OF ANY EVIDENCE THAT DEANNA FAILED TO PROTECT HER DAUGHTER KENDALL; RIGHT?

"ANSWER: RIGHT.

* * *

[931] "QUESTION: BEFORE REMOVING KENDALL AND PRESLIE FROM THEIR HOME, DID YOU CONSIDER PLACING THEM WITH ANY OTHER FAMILY MEMBER, FOR EXAMPLE?

"ANSWER: NO.

"QUESTION: DID ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY MAKE THAT RECOMMENDATION TO THE COURT ON FEBRUARY 17TH?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY OTHER EVIDENCE PRESENTED TO THE COURT IN MAKING ITS DECISION TO REMOVE THE CHILDREN FROM DEANNA'S CARE BESIDES YOUR COURT REPORT ADDENDUM AND THE DISCUSSION THAT WAS HAD AT THE COURTHOUSE ON THE [932] 17TH?

"ANSWER: NO.

"QUESTION: ON THE 17TH OF FEBRUARY DID YOU TELL THE COURT THAT IT WAS YOU WHO TOLD KENDALL THAT IF SHE DIDN'T START VISITING WITH HER DAD THE JUDGE WAS GOING TO PUT HER IN A HOME?

"ANSWER: NO.

"QUESTION: DID ANYONE WITH SOCIAL SERVICES AGENCY TELL THE JUDGE ON FEBRUARY 17TH THAT YOU HAD THREATENED TO THE GIRLS THAT IF THEY DIDN'T START VISITING WITH THEIR DAD, THE JUDGE WAS GOING TO PUT THEM IN A HOME?

"ANSWER: NO.

"QUESTION: ANY TIME AFTER DEANNA LEFT ON FEBRUARY 15TH, AND BEFORE THE HEARING ON FEBRUARY 17TH, DID YOU OR ANYONE ELSE AT YOUR AGENCY NOTIFY DEANNA THAT YOU INTENDED TO MAKE THIS NEW ALLEGATION THE MORNING OF THE 17TH? AND I WANT TO CLARIFY THE NEW ALLEGATION BEING THAT SHE ALLEGEDLY TOLD HER CHILDREN – LET ME GET IT RIGHT – THAT THEIR FATHER WAS TRYING TO TAKE THEM AWAY AND PUT THEM IN A FOSTER HOME.

[933] "ANSWER: NO.

* * *

[934] "QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA WAS NOT A FIT AND PROPER PARENT FOR HER DAUGHTERS WHEN THEY WERE REMOVED FROM HER CARE ON FEBRUARY 17TH, 2000?

"ANSWER: NO.

"QUESTION: THE GIRLS WERE NOT IN IMMINENT DANGER OF SERIOUS PHYSICAL INJURY IN DEANNA'S CARE, WERE THEY?

"ANSWER: NO.

"QUESTION: ALL RIGHT. BUT YOU [935] WERE, AS OF FEBRUARY 17TH, 2000, THE SENIOR SOCIAL WORKER WHO WAS RESPONSIBLE FOR THIS PARTICULAR CASE ON BEHALF OF THE ORANGE COUNTY SOCIAL SERVICES AGENCY; RIGHT?

"ANSWER: YES.

"QUESTION: AND AS YOU SAT THERE IN COURT ON FEBRUARY 17TH, 2000, AND THE COURT WAS ORDERING THE REMOVAL OF THESE CHILDREN DUE TO THE MAKING OF FALSE STATEMENTS AGAINST THE FATHER – THE SOCIAL WORKER AND THE MONITOR – WERE YOU AWARE OF ANY FALSE STATEMENTS THAT DEANNA HAD MADE AGAINST ANY OF THESE PEOPLE?

"ANSWER: NO.

"QUESTION: DID YOU SPEAK UP AND SAY, 'WAIT A MINUTE, JUDGE, THERE'S NO EVIDENCE OF FALSE STATEMENTS AGAINST ANY OF THOSE PEOPLE'?

"ANSWER: NO.

"QUESTION: DID YOU EVER HEAR DEANNA DISCUSS THIS CASE WITH THE CHILDREN?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY [[936] OTHER SOCIAL WORKER WHO ALLEGEDLY HEARD DEANNA DISCUSS THE CASE WITH THE CHILDREN BEFORE FEBRUARY 17TH, 2000?

"ANSWER: NO.

* * *

"QUESTION: ON WHAT OCCASION OR OCCASIONS AFTER FEBRUARY 15TH AND BEFORE THIS FEBRUARY 23RD SECOND AMENDED PETITION WAS FILED DID THE CHILDREN BECOME FEARFUL AND REFUSE TO VISIT OR TELEPHONE THEIR FATHER?

"ANSWER: AT WHAT POINT BETWEEN THE 23RD AND – COULD YOU RESTATE THAT?

[937] "QUESTION: WELL, THE ALLEGATION IS THAT DEANNA MADE THIS STATEMENT TO THE CHILDREN WHICH CAUSED THE MINORS TO BE FEARFUL AND REFUSE TO VISIT OR TELEPHONE THEIR FATHER; CORRECT?

"ANSWER: YES.

"QUESTION: THAT'S THE ALLEGATION?

"ANSWER: YES.

"QUESTION: SO I'M ASKING YOU, ON WHAT OCCASION OR OCCASIONS AFTER SHE ALLEGEDLY MADE THE STATEMENT ON FEBRUARY 15TH AND BEFORE THIS PETITION WAS FILED ON FEBRUARY 23RD DID THE CHILDREN BECOME FEARFUL AND REFUSE TO VISIT OR TELEPHONE THEIR FATHER?

"ANSWER: I DON'T KNOW.

* * *

[938] "QUESTION: DO YOU HAVE ANY REASON TO BELIEVE THAT DEANNA'S ALLEGED STATEMENT EVER CAUSED THE CHILDREN TO REFUSE TO VISIT THEIR FATHER?

"ANSWER: I HAVE NO – I HAVE NO FACTS TO BACK UP A BELIEF.

* * *

[940] "QUESTION: DID YOU INTERVIEW KENDALL AT ORANGEWOOD ON MARCH 3RD, 2000?

"ANSWER: YES.

"QUESTION: AND MS. DUMAS WAS ALSO PRESENT THAT DAY?

"ANSWER: YES.

"QUESTION: WAS DEANNA EITHER [941] ASKED OR PERMITTED TO BE PRESENT AT THAT INTERVIEW?

"ANSWER: NO, SHE WAS NOT ASKED; AND NO, SHE WAS NOT PERMITTED TO BE THERE.

"QUESTION: AND WHY IS THAT?

"ANSWER: IT'S STANDARD POLICY NOT TO INTERVIEW CHILDREN WITH THEIR PARENTS PRESENT.

"QUESTION: YOU MEAN STANDARD POLICY AT THE ORANGE COUNTY SOCIAL SERVICES AGENCY?

"ANSWER: YES.

* * *

"QUESTION: ARE YOU AWARE OF ANY INTERVIEW WHERE THE MOTHER WAS ALLOWED TO BE PRESENT?

"ANSWER: NO.

* * *

[942] "QUESTION: JUST FOR FOUNDATIONAL PURPOSES, THE SECOND AMENDED PETITION CONTAINS AN ALLEGATION AT PARAGRAPH B-5. THIS IS EXHIBIT 11, BY THE WAY. SEE THE ALLEGATION AT B-5?

"ANSWER: YES.

"QUESTION: THE ALLEGATION THERE IS THAT, QUOTE, ON OR ABOUT FEBRUARY 15TH, THE MOTHER TOLD THE CHILDREN THAT THE FATHER WAS TRYING TO TAKE THEM AWAY

FROM HER AND PUT THE CHILDREN IN A FOSTER HOME, END QUOTE.

"THAT'S THE ALLEGATION THERE – AT LEAST OF THE BEGINNING OF IT, RIGHT?

"ANSWER: YES.

"QUESTION: DID YOU READ THAT ALLEGATION TO KENDALL WHEN YOU MET WITH HER ON MARCH 3RD, 2000?

"ANSWER: YES.

"QUESTION: WHEN YOU READ THIS ALLEGATION TO KENDALL, SHE DENIED THAT DEANNA TOLD HER THAT HER FATHER WAS TRYING TO TAKE HER AWAY AND PUT HER IN A [943] FOSTER HOME, DIDN'T SHE?

"ANSWER: YES.

"QUESTION: IN FACT, SHE STATED EMPHATICALLY THAT, QUOTE, MY MOM DIDN'T SAY THAT, IT'S NOT TRUE, END QUOTE, DIDN'T SHE?

"ANSWER: YES.

"QUESTION: WITH THIS ADDITIONAL INFORMATION, DID ORANGE COUNTY SOCIAL SERVICES AGENCY RETURN CUSTODY OF THE CHILDREN TO THEIR MOTHER?

"ANSWER: NO.

"QUESTION: IN FACT, YOU RECOMMENDED THAT THE CHILDREN BE DECLARED DEPENDENTS OF THE ORANGE COUNTY JUVENILE COURT WITH CUSTODY VESTED IN THE SOCIAL SERVICES' DIRECTOR FOR SUITABLE PLACEMENT?

"ANSWER: YES.

* * *

[944] "QUESTION: AND IF THE JUDGE WERE TO ADOPT THAT RECOMMENDATION, THAT THE CHILDREN BE DECLARED DEPENDENTS OF THE JUVENILE COURT, WITH CUSTODY VESTED IN THE SOCIAL SERVICES DIRECTOR FOR SUITABLE PLACEMENT, THEN THE PLACEMENT DIVISION OF YOUR AGENCY WOULD DECIDE WHAT WAS SUITABLE PLACEMENT?

"ANSWER: YES.

"QUESTION: YOUR AGENCY COULD HAVE RETURNED THE CHILDREN TO THEIR HOME WITH THEIR MOTHER ANY TIME YOUR AGENCY DECIDED TO DO SO AFTER FEBRUARY 23RD, 2000; CORRECT?

"ANSWER: YES.

"QUESTION: AND YOU DID NOT DO SO?

"ANSWER: CORRECT.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE,	)	NO. 01CCO2379
MARCIE VREEKEN,	)	
ELAINE WILKINS, AND	)	
HELEN DWOJAK,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 27, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1064] RAY WILLIAM LONDON,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. SUTHERLAND:

Q GOOD MORNING, DR. LONDON.

YOU ARE AN EXPERT WHO WAS RETAINED BY THE PLAINTIFF IN THIS CASE, ARE YOU NOT?

A YES, I AM.

* * *

[1069] Q DID YOU EVEN CONTINUE ON WITH YOUR EDUCATION AFTER OBTAINING YOUR PH.D.?

A YES. I VIOLATED JUNE'S RULE ABOUT NEVER SAYING NEVER. AFTER I FINISHED MY PH.D., I SAID I WOULD NEVER GO BACK TO SCHOOL. SEVERAL YEARS LATER, I WENT BACK FOR A MASTER'S IN BUSINESS ADMINISTRATION.

Q WHAT YEAR DID YOU ACTUALLY OBTAIN YOUR M.B.A.?

A 1989.

Q WAS THAT AGAIN FROM U.S.C.?

A YES.

Q DID YOUR AREAS OF FOCUS IN THAT PARTICULAR PROGRAM INCLUDE ANY SUBJECTS THAT WOULD BEAR ON THE ISSUES IN THIS CASE?

A YES. THE FOCUS OF MY STUDY WAS ON ORGANIZATIONAL STRUCTURES AND POLICIES AND IMPLEMENTATIONS. THAT'S CALLED ORGANIZATIONAL DEVELOPMENT. AND ALSO ORGANIZATIONAL BEHAVIOR, HOW PEOPLE BEHAVE WITHIN ORGANIZATIONS AND HOW ORGANIZATIONS IMPACT THE BEHAVIOR OF EMPLOYEES.

I ALSO WAS A FELLOW AT THE CRISIS MANAGEMENT CENTER. THAT'S DEALING WITH AND ASSESSING HOW [1070] ORGANIZATIONS GET INTO TROUBLE AND HOW THEY RESPOND TO THINGS WHEN THEY DON'T GO RIGHT.

Q DID YOU ALSO FOCUS ON RISK AND CRISIS MANAGEMENT AS PART OF YOUR M.B.A. PROGRAM?

A YES, I DID.

* * *

Q I NEED YOU TO EXPLAIN THEN. THESE WORDS ARE NOT PROBABLY FAMILIAR TO MOST PEOPLE.

WHAT IS ORGANIZATIONAL BEHAVIOR AND DEVELOPMENT ABOUT?

A IT'S ABOUT HOW ORGANIZATIONS FUNCTION AND DEVELOP AND HOW THEY PROVIDE SERVICES OR PRODUCTS AND HOW PEOPLE IN ORGANIZATIONS WORK AND FUNCTION.

Q WHAT IS RISK AND CRISIS MANAGEMENT?

A CRISIS MANAGEMENT AND RISK MANAGEMENT ARE A FIELD OF STUDY THAT LOOK AT HOW THINGS AND ORGANIZATIONS CAN BASICALLY GO WRONG.

LIKE EXXON-VALDEZ OR THE TYLENOL TAMPERING CASES, HOW THERE IS A PATTERN OF BEHAVIOR OF APPROVAL OF [1071] CERTAIN BEHAVIORS THAT – WITHIN ORGANIZATIONS THAT PEOPLE KNOW MAY BE WRONG, BUT THEY DO IT – SOMETIMES THEY THINK THAT THEY'RE SPECIAL AND SO THEY WON'T GET CAUGHT, OR IF THEY GET CAUGHT THEY WON'T CARE.

AND IT'S BASICALLY A FUNCTION OF ASSESSING HOW IT DOES AND WHAT – HOW THEY HANDLE THE SITUATION WHEN IT COMES TO LIGHT AND DOING POST-MORTEMS AFTER.

* * *

[1083] Q ALL RIGHT. NOW I WOULD LIKE TO TURN TO WHAT YOU ARE BASING THE OPINIONS YOU ARE GOING TO GIVE ON.

OKAY?

A UH-HUH.

Q FIRST I WANT TO ASK YOU, HOW MUCH MATERIAL DID YOU READ IN THIS CASE? CAN YOU GIVE US AN IDEA OF THE VOLUME?

A IT STANDS ABOUT EIGHT FEET.

Q DID YOU MAKE A LIST OF THE MATERIALS THAT YOU [1084] REVIEWED IN FORMULATING YOUR OPINIONS?

A YES, I DID.

* * *

BY MS. SUTHERLAND:

Q I'M NOT GOING TO GO THROUGH EVERYTHING ON THE LIST, BUT I WANT TO ASK YOU A FEW CATEGORIES OF ITEMS.

DID YOU REVIEW IN THIS CASE THE ENTIRE SOCIAL SERVICES AGENCY FILE?

[1085] A YES.

Q ABOUT HOW THICK WAS THAT FILE?

A I DON'T KNOW. SIX, SEVEN INCHES, EIGHT INCHES.

Q DID YOU ALSO REVIEW THE JUVENILE COURT FILE?

A YES.

Q DID YOU REVIEW PLAINTIFF'S TREATMENT RECORDS FROM DOCTORS WARNER AND WALDROP AND FROM MS. JANICE BEACON?

A YES.

Q DID YOU REVIEW KENDALL'S SCHOOL RECORDS DATING BACK TO WHEN SHE STARTED?

A YES.

Q ABOUT HOW VOLUMINOUS WERE THOSE RECORDS?

A I DON'T KNOW. SEVEN OR EIGHT INCHES, AS I REMEMBER. THERE WERE A LOT.

Q DID YOU ALSO REVIEW DR. MITCHELL'S RECORDS REGARDING HER COUNSELING OF THE GIRLS OVER THE YEARS?

A YES.

Q ABOUT HOW THICK WERE THOSE RECORDS?

A ABOUT SIX, SEVEN INCHES.

Q AND I'M GOING TO GO THROUGH A LIST OF SOME NAMES, AND I'M GOING TO ASK YOU WHETHER OR NOT YOU READ THESE PERSONS'

DEPOSITION TRANSCRIPTS IN FORMULATING YOUR OPINIONS.

MRS. FOGARTY-HARDWICK?

A YES.

[1086] Q DID YOU READ ELAINE WILKINS?

A YES.

Q HELEN DWOJAK?

A YES.

Q JOYCE REILY?

A YES.

Q LARRY LEAMAN?

A YES.

Q MARCIE VREEKEN?

A YES.

Q DR. MARJORIE MITCHELL?

A YES.

Q PATRICIA DUMAS?

A YES.

Q RACHEAL DAVIS?

A YES.

Q SUSAN HOLL?

A YES.

Q DR. BARBARA WARNER?

A YES.

Q CARY HARDWICK?

A YES, I THINK I DID.

Q AND JANICE BEACON?

A YES.

Q DID YOU ALSO READ DR. MITCHELL'S – WELL, EXCERPTS FROM DR. MITCHELL'S TESTIMONY FROM THE FAMILY [1087] COURT TRIAL?

A YES.

Q DID YOU ALSO READ PORTIONS OF MS. DAVIS'S TESTIMONY FROM THE JUVENILE COURT TRIAL?

A YES.

Q DID YOU ALSO REVIEW VARIOUS RESPONSES TO INTERROGATORIES OR WRITTEN QUESTIONS BETWEEN THE PARTIES TO THIS CASE AND RESPONSES TO REQUESTS FOR ADMISSIONS?

A YES.

* * *

[1088] Q ALL RIGHT. I WOULD LIKE TO BEGIN BY ASKING YOU, DID YOU FORM AN

OPINION REGARDING – AN OVERALL GENERAL OPINION OF WHAT HAPPENED IN TERMS OF THE SOCIAL SERVICES AGENCY'S HANDLING OF THIS CASE?

A YES.

* * *

[1110] AFTER REVIEWING ALL OF THESE MATERIALS AND EVALUATING THE PLAINTIFF, DID YOU REACH A DIAGNOSIS AS TO HER CURRENT PSYCHOLOGICAL CONDITION?

AND, HERE, I'M NOT ASKING FOR HER CONDITION BACK IN 2000 TO 2004. WE'RE GOING TO ASK THE DOCTORS WHO TREATED HER THEN ABOUT THAT. BUT HER CURRENT CONDITION.

A SHE WAS MODERATELY TO SEVERELY DEPRESSED.

Q ANYTHING ELSE?

A I THINK SHE HAS PERIODS OF ANXIETY AND CERTAINLY SOME PSYCHOPHYSIOLOGICAL REACTIONS.

Q WHAT DO YOU MEAN BY THAT?

A GRINDING OF TEETH, GASTROINTESTINAL PROBLEMS. MOST OF US HAVE SOME KIND OF TARGET PHYSICAL SYMPTOMS WHEN WE GET REALLY UPSET OR DEPRESSED AND WE'LL FEEL PAINS OR DYSFUNCTION IN THAT AREA.

* * *

[1111] Q YEAH. WELL, HOW DID YOU PERCEIVE THE MOTHER'S ROLE WITH THE CHILDREN BEFORE THEY WERE TAKEN FROM HER?

* * *

THE WITNESS: I WAS RAISED ON A FARM. WE HAD BANTY HENS. BANTY HENS ARE LITTLE CHICKENS. AND I HAD A HOLSTEIN BULL, AND HE HAD A BIG RING IN HIS NOSE. AND THAT BULL COULD GO ANYWHERE HE WANTED EXCEPT WHEN THE BANTY HEN WAS THERE WITH HER CHICKS, AND SHE WOULD TAKE HIM ON AND HE WOULD TURN AND RUN.

I THINK SHE DEDICATED HER LIFE TO PROTECTING HER CHILDREN AND DOING THE BEST FOR HER CHILDREN. I THINK THAT THAT'S REALLY HOW SHE SAW HERSELF.

BY MS. SUTHERLAND:

Q AND A MOTHER LIKE YOU JUST DESCRIBED –

A THE BANTY HEN.

Q A MOTHER LIKE YOU JUST DESCRIBED – IS THE LOSS OF THAT CHILD, FOR THAT KIND OF A PARENT, MORE PROFOUND THAN, SAY, A PARENT WHO DIDN'T HAVE SUCH A CLOSE RELATIONSHIP?

* * *

[1112] THE WITNESS: YES. MUCH MORE SEVERE.

BY MS. SUTHERLAND:

Q CAN YOU EXPLAIN WHY?

A WELL, IF THE RELATIONSHIP IS REALLY FUNCTIONAL AND YOU DEDICATE A TREMENDOUS AMOUNT OF YOUR OWN PSYCHIC ENERGY AND INTEREST AND CONCERN WITH PROTECTING THE CHILDREN, AND THEN YOU'RE PLACED IN A SITUATION WHERE (A) THERE ARE NO CHILDREN OR (2) YOU CAN NO LONGER PROTECT THEM, THEN IT CAUSES WHAT EUPHEMISTICALLY WE CALL A NARCISSISTIC WOUND.

A NARCISSISTIC WOUND IS SOMETHING THAT HURTS YOU SO BAD, RIGHT AT THE CORE OF YOUR SOUL OR YOUR HEART OR WHATEVER, THAT IT SHAKES UP AND ESSENTIALLY DESTROYS YOUR ENTIRE WORLD.

SHE WAS DEVASTATED, WOULD BE DEVASTATED.

Q ARE YOU SAYING WHEN YOU MENTION A NARCISSISTIC WOUND THAT APPLIES TO DEANNA?

A YES, I BELIEVE SO.

* * *

Q AND THE DEPRESSION THAT SHE'S CURRENTLY EXPERIENCING – THE ANXIETY AS WELL – DO YOU RELATE THOSE BACK TO THE REMOVAL OF HER CHILDREN OR TO SOME OTHER CAUSE?

A I THINK IT'S AT THIS POINT IN TIME TO THE [1113] REMOVAL OF THE CHILDREN.

Q EXPLAIN YOUR REASON OR REASONS WHY.

A BECAUSE THAT'S THE THING – THAT'S THE BIGGEST PSYCHOSOCIAL STRESSOR THAT SHE'S HAD. THERE IS CERTAINLY EVIDENCE THAT HER PSYCHOLOGICAL STRESS LEVEL INCREASED WITH THE REMOVAL OF THE CHILDREN.

Q WHAT ABOUT HER EFFORTS TO REESTABLISH A RELATIONSHIP WITH THE CHILDREN? HOW DID THAT PLAY INTO HER CURRENT CONDITION?

A I THINK THAT – THAT FURTHER SUBSTANTIATES THAT SHE'S A BANTY HEN AND THAT IT WAS A WAY OF TRYING TO REPAIR HER WORLD AND TO BE THERE FOR HER CHILDREN.

SO IT WASN'T JUST HERSELF; IT WAS REALLY FOCUSED ON THE CHILDREN AND THE CHILDREN'S WORLD. AND SHE WANTED TO BE A PART OF THAT AND SHE DID EVERYTHING SHE COULD TO DO THAT.

Q DO YOU CONSIDER THE MOTHER'S DEPRESSION, ANXIETY, THIS NARCISSISTIC WOUND AND HER CONDITION TODAY – DO YOU CONSIDER THAT TO BE A PERMANENT CONDITION OR A NONPERMANENT CONDITION?

A I THINK IT'S GOING TO BE LONG-TERM. I THINK THAT IT CAN BE – WITH THE RIGHT TYPE OF INTERVENTION, IT CAN BE TREATED.

* * *

[1114] Q WHAT DO YOU MEAN BY "THE APPROPRIATE TYPE OF PSYCHOTHERAPY"?

A I THINK SHE NEEDS SOME HELP IN TERMS OF DEALING WITH THE LOSS AND THE ONGOING ISSUES OF THE CHILDREN GROWING UP.

I MEAN, SHE MISSED A WHOLE SEGMENT, A WHOLE ESSENTIAL PART OF THEIR LIVES DEVELOPMENTALLY, AND SHE NEEDS TO CATCH UP WITH THAT AND LEARN HOW TO DEAL WITH THAT.

* * *

[1116] Q AFTER HAVING REVIEWED ALL THESE MATERIALS IN THIS CASE, DID YOU ALSO FORM AN OPINION AS TO THE SOCIAL SERVICES AGENCY'S HANDLING OF THIS CASE?

A YES.

Q WHAT ARE YOUR OPINIONS – YOUR OVERALL OPINIONS OF THEIR HANDLING OF THIS CASE?

* * *

THE WITNESS: I THINK THAT THEY HAD POLICIES AND PROCEDURES THAT DID NOT REQUIRE APPROPRIATE INTERVENTION.

I THINK THAT THEY HAVE – THEY HAD A SYSTEM WHERE, WHEN THERE IS A DIFFERENCE OF OPINION BETWEEN THE CLIENT OR THE CHILDREN OR THE SOCIAL WORKER, THAT THE SOCIAL WORKER TAKES PRECEDENCE.

I THINK THEY HAVE A POLICY AND PRACTICES OF DISBELIEVING THE CLIENT AND THE CHILDREN.

I THINK THAT THEY PUT THE INTERESTS OF PROTECTING THE SOCIAL WORKER OVER THE BEST INTERESTS OF THE CHILD.

I THINK THAT THEY ACCUSED THE MOTHER OF THINGS AS A MATTER OF COURSE, LIKE JUST BOILERPLATE ACCUSATIONS WITHOUT JUSTIFICATION OR WARRANT.

[1117] I THINK THEY HAVE A PROCEDURE AND A POLICY THAT SAYS THAT THEY DON'T EVEN HAVE TO FOLLOW SOME OF THEIR OWN POLICIES AND PROCEDURES.

I THINK, CONTRARY TO FEDERAL GUIDELINES, THEY EXPERIMENTED WITH THE PARENT-CHILD RELATIONSHIP BY REMOVING THE CHILD WITH KNOWN HARM, BECAUSE EVERY SOCIAL WORKER KNOWS THAT THERE IS HARM WHEN YOU MOVE CHILDREN. YOU HAVE TO BALANCE THAT OUT.

AND THE ONLY THING I FOUND IN THE CASE WAS THAT THE SOCIAL WORKERS WANTED TO ASSESS WHAT KIND OF INFLUENCE THE MOTHER WAS HAVING ON THE CHILDREN; AND, YOU KNOW, THAT'S INAPPROPRIATE AND IT'S UNPROFESSIONAL AND IT'S NOT A VALID JUSTIFICATION. IT'S SOME ISSUES OF THE POWER OF THE SOCIAL WORKER.

* * *

[1118] Q BEFORE THE AGENCY BECAME INVOLVED IN THE LIVES OF KENDALL HARDWICK, PRESLIE HARDWICK, AND DEANNA FOGARTY-HARDWICK, DID THE MOTHER AND CHILDREN ENJOY A FUNCTIONAL MATERNAL-CHILD RELATIONSHIP?

A YES.

Q ARE YOU FAMILIAR WITH THE PHRASE "AGENCY CASE"?

A YES.

Q WHAT DOES THAT MEAN?

A IT'S A CASE WHERE EVERYONE IN THE SOCIAL SERVICES AGENCY KNOWS IT AND EVERYBODY HAS OPINIONS ABOUT IT. IT JUST KIND OF BECOMES A CELEBRITY CASE, AND USUALLY NOT IN A POSITIVE WAY. AND SO THEN THERE IS DIVISIONS WITHIN THE RANKS ABOUT IF THIS IS GOOD OR IF THIS IS BAD, AND IT'S SOMEWHAT DIVISIVE.

I THINK THIS IS REALLY EVIDENT IN THE FACT THAT THERE WERE ACCUSATIONS MADE AGAINST THE MOTHER BY SOCIAL WORKERS SAYING SHE WAS MENTALLY ILL AND HAD A PERSONALITY DISORDER WHEN THERE WASN'T ANY EVIDENCE TO SUPPORT THAT.

* * *

[1138] Q CAN AN ORGANIZATION'S POLICIES EXIST IN BOTH WRITTEN AND UNWRITTEN FORM?

A ABSOLUTELY.

Q CAN YOU DESCRIBE HOW THOSE POLICIES MIGHT EXIST IN UNWRITTEN FORM?

A EVERY ORGANIZATION HAS A CULTURE. SOME ARE KIND OF LIKE FAMILIES. SOME OF THEM ARE FUNCTIONAL FAMILIES; SOME OF THEM ARE DYSFUNCTIONAL FAMILIES.

THOSE CULTURES, THOSE ORGANIZATIONS TEACH PEOPLE WHAT'S ACCEPTABLE BEHAVIOR AND IN THAT GROUP. THEY TEACH THEM

USUALLY NOT TO QUESTION CERTAIN KINDS OF [1139] POLICIES.

YOU KNOW, IN THIS CASE, THERE IS A STANDARD BOILERPLATE. THESE SOCIAL WORKERS TESTIFIED THAT IF THERE'S AN ALLEGATION OF ABUSE OF ONE PARENT, THEN THEY AUTOMATICALLY MAKE AN ACCUSATION AGAINST THE OTHER. THAT MAKES ABSOLUTELY NO CLINICAL SENSE, AND IT'S JUST PART OF THAT UNWRITTEN POLICY.

NOW, HAVING THE BOILERPLATE IS A WRITTEN POLICY, YOU KNOW, AND THERE ARE STANDARDS THAT NEED TO BE MET BEFORE YOU CAN PUT THAT IN. YOU KNOW, THOSE STANDARDS WEREN'T MET IN THIS CASE. BUT BEFORE YOU CAN PUT THAT IN.

THE UNWRITTEN RULE IS THAT WE ALWAYS DO IT THAT WAY. AND IT'S A WAY OF INCREASING THE POWER AND THE CONTROL OF THE ORGANIZATION OR THE AGENCY.

Q DID YOU DISCOVER ANY EFFORTS AT RECONCILIATION OR CORRECTION ONCE THE PROBLEM WITH MS. VREEKEN AND MS. FOGARTY ESCALATED TO A REMOVAL OF THE CHILDREN?

A NONE.

Q WOULD YOU HAVE EXPECTED TO SEE THAT?

A YES.

Q WHAT WOULD YOU HAVE EXPECTED TO SEE?

A I WOULD HAVE EXPECTED THAT THERE BE SOME KIND OF MEDIATION, INTERVENTION, OR CONSULTATION IN TERMS OF BUILDING THAT RELATIONSHIP, GETTING IT BACK ON TRACK.

THAT BEING ABSENT, I WOULD EXPECT THERE WOULD [1140] BE KIND OF LIKE A SPECIAL MONITOR THAT KIND OF MONITORS, YOU KNOW, BOTH PEOPLE.

Q DID YOU DISCOVER ANY EVIDENCE THAT THE AGENCY INVESTIGATED THE MOTHER'S COMPLAINT THAT THE SOCIAL WORKER HAD LIED IN COURT?

A NOT IN ANY REAL SENSE. I THINK THEY JUST KIND OF DISCOUNTED IT.

Q WOULD YOU HAVE EXPECTED TO SEE SOME KIND OF AN INVESTIGATION?

A YES.

Q WHY WOULD THAT BE?

A BECAUSE THIS AGENCY HAS A TREMENDOUS AMOUNT OF POWER. AND IN ADDITION TO BEING SOCIAL WORKERS, THEY'RE ALSO AGENTS OF SOCIAL CONTROL.

AND THAT ORGANIZATIONS THAT HAVE THAT KIND OF POWER AND HAVE THAT KIND OF INFLUENCE NEED SOME KIND OF INTERNAL AFFAIRS OR REVIEW PROCESS. AND WHEN THERE'S SIGNS OF THAT KIND OF GOING ON OR THOSE KINDS OF ACCUSATIONS GOING ON, THEN A NEUTRAL PARTY NEEDS TO ATTEND TO THAT AND MAKE SURE THAT IT'S NOT EXTENDING OR BREAKING POLICIES AND TO TRY TO MAKE IT BETTER.

* * *

[1144] Q IN YOUR REVIEW OF THE EVIDENCE IN THIS CASE, WERE THE DEFENDANT SOCIAL WORKERS MINDFUL OF PLAINTIFF'S RIGHTS AS THE MOTHER OF THESE TWO GIRLS?

A I DON'T BELIEVE SO.

Q WHY IS THAT?

A BECAUSE THE BEST WAY TO DETERMINE WHAT PEOPLE WANT TO DO IS TO OBSERVE THEIR BEHAVIOR, AND SOMEONE WHO WAS MINDFUL OF THOSE PARENTAL RIGHTS WOULD HAVE BEEN MORE BALANCED AND NEUTRAL IN THE ASSESSMENT. THEY WOULD HAVE FOLLOWED THE STANDARD ASSESSMENT GUIDELINES. THEY WOULD HAVE GATHERED MORE FACTS. THEY WOULD HAVE INTERVIEWED THE CHILDREN DIFFERENTLY, ESPECIALLY KENDALL, BECAUSE OF HER

CONDITION. THEY WOULD HAVE TRIED TO WORK IT OUT, WOULD HAVE NOT TAKEN SIDES. IT SEEMS TO ME THAT THEY REALLY TOOK SIDES WITH THE FATHER. AND THEY WOULD HAVE TOLD THE JUDGE ALL THE INFORMATION THE JUDGE NEEDED TO [1145] KNOW, BOTH POSITIVE AND NEGATIVE.

Q ALL RIGHT. LAST QUESTION.

EARLIER IN YOUR TESTIMONY YOU DESCRIBED WHAT AN AGENCY CASE IS.

DID THIS BECOME AN AGENCY CASE?

A THIS WAS AN AGENCY CASE.

Q WHY DO YOU BELIEVE THAT TO BE THE CASE?

A ONE, BECAUSE ALL THE HALLMARKS ARE THERE: STATEMENTS BY SOCIAL SERVICES THAT THIS IS A VERY DIFFICULT CASE; ACCUSATIONS ABOUT PEOPLE'S MENTAL STATUS WHEN IT'S UNJUSTIFIED; STATEMENTS ABOUT CHARACTERIZING THE PERSON AS HAVING A SILVER SPOON IN THEIR MOUTH WHEN, YOU KNOW, THAT ISN'T – THAT ISN'T TRUE. IT BECAME AN AGENCY CASE BECAUSE OF SOME OF DEANNA'S PAST – YOU KNOW, PAST ACHIEVEMENTS.

THERE'S AN INTERESTING STUDY CALLED "CELEBRITIES ON THE COUCH" THAT TALKS ABOUT AND ADDRESSES ISSUES WITH PEOPLE

THAT HAVE BEEN SUCCESSFUL AND HOW SOCIAL SERVICES AND MENTAL HEALTH PEOPLE OFTEN MISTREAT THEM. AND I THINK THIS WAS A CASE WHERE THE CHILDREN AND SHE WERE MISTREATED.

* * *

[1146] KEVIN HARDWICK,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[1147] Q MR. HARDWICK, WHAT'S YOUR RELATION TO CARY HARDWICK?

A HE'S MY BROTHER.

* * *

A YEAH, MY BIOLOGICAL BROTHER.

Q AND AT SOME POINT AFTER FEBRUARY 15, 2000, DID YOU BECOME AWARE THAT DEANNA'S CHILDREN HAD BEEN REMOVED FROM HER HOME?

A YES, I DID.

Q OKAY. AND YOU BECAME AWARE OF THE CIRCUMSTANCES OF THAT REMOVAL?

A YES, I DID.

Q OKAY. AND AT SOME POINT AFTER THE CHILDREN WERE REMOVED, DID YOU HAVE OCCASION TO CALL MS. VREEKEN OR SPEAK TO MS. VREEKEN IN RELATION TO HOW THE CASE WAS PROCEEDING AND THE NATURE OF THE REMOVAL?

A YES.

Q OKAY. DO YOU REMEMBER ABOUT WHEN THAT HAPPENED, THAT TELEPHONE – WAS IT TELEPHONE OR IN PERSON?

A IT WAS A TELEPHONE CALL.

* * *

[1153] Q AT SOME POINT DID YOU TRY TO MOVE UP THE CHAIN AND TALK TO MS. VREEKEN'S SUPERVISOR?

A YES, I DID.

Q OKAY. ABOUT WHEN DID THAT HAPPEN?

A I THINK I SPENT A LITTLE TIME INVESTIGATING, TRYING TO SEE WHO IT WAS.

ABOUT SIX WEEKS LATER, I FINALLY WAS ABLE TO CONNECT WITH SOMEONE.

[1154] Q SO SOMETIME MAYBE IN APRIL OF 2000?

A IN APRIL. EARLY APRIL.

Q WHO WAS IT THAT YOU SPOKE WITH?

A A MISS DWOJAK.

* * *

Q AND EXPLAIN FOR US, IF YOU COULD, THE SUBSTANCE OF THAT CONVERSATION WITH MS. DWOJAK?

A AT THIS POINT I JUST FELT IT WAS TIME TO MOVE UP THE CHAIN BECAUSE I DIDN'T FEEL THAT ANYONE WAS GIVING ME ANY REASONABLE ANSWERS AS TO WHY DEANNA HARDWICK WOULD BE TAKEN – THE KIDS WOULD BE TAKEN FROM HER AND THEY WOULD BE PLACED IN THIS FACILITY, AND IT SEEMED THE NATURAL THING TO DO WAS SORT OF GO UP THE CHAIN OF COMMAND.

SO I HAD LEFT HER A MESSAGE JUST SAYING I WOULD LIKE TO KNOW A LITTLE BIT MORE AS TO WHY MY NIECES HAVE BEEN TAKEN FROM THEIR MOTHER AND WHY I'M ON MONITORED VISITS ONCE A WEEK. IT'S – YOU KNOW, IT'S IMPACTING MY RELATIONSHIP WITH THEM.

* * *

[1155] Q MS. DWOJAK – YOU SAID SHE CALLED YOU BACK?

A SHE DID CALL ME BACK.

Q HOW DID THAT – HOW DID THAT TELEPHONE CALL GO?

A I HAD LEFT HER A MESSAGE SPECIFICALLY THAT – YOU KNOW, I'D HOPED TO JUST ADDRESS THESE TWO THINGS IN A CALM DEMEANOR, BECAUSE I HAD RECENTLY HAD A HEART ATTACK AND I WASN'T DOING TOO WELL EMOTIONALLY AT THIS TIME PERIOD.

SO I WAS REALLY EXPECTING JUST – CAN YOU JUST GIVE ME A COUPLE ANSWERS. AND, REALLY, WHAT I RECALL FROM THE CONVERSATION IS HER DEMEANOR WAS VERY ATTACKING FROM THE MOMENT WE STARTED TO SPEAK.

Q HOW DO YOU MEAN? WHAT DO YOU MEAN BY "ATTACKING"?

A WELL, JUST ABUSIVE IN HER TONE. HER TONE WAS VERY JUST AGGRESSIVE, IF THAT MAKES SENSE. I DON'T REMEMBER – I CAN'T TELL YOU THE EXACT WORDS THAT SHE [1156] USED, BUT I DO REMEMBER THAT. I REMEMBER A COUPLE STATEMENTS SHE EVENTUALLY SAID, BUT I DON'T REMEMBER – I JUST REMEMBER THAT IT STARTED OFF VERY BADLY.

Q YOU SAY YOU REMEMBER A COUPLE OF STATEMENTS THAT SHE SAID. WHAT WERE THOSE STATEMENTS?

A EVENTUALLY, AS WE GOT TO ME ASKING SOME QUESTIONS, SHE MADE THE STATEMENT – I DO RECALL THE STATEMENT

THAT SHE MADE THAT MY ENTIRE FAMILY WAS – I DON'T KNOW IF SHE USED THE WORD "CRAZY" OR SOMETHING LIKE THAT.

Q OKAY.

A AND THAT JUST KIND OF SHOCKED ME, BECAUSE WE HAD NEVER MET. I KNEW SHE HAD NOT MET MOST OF MY FAMILY.

* * *

Q DID YOU ASK HER WHY YOU HAD BEEN PUT ON MONITORED VISITS?

A I TRIED TO ASK HER WHY I WAS PLACED ON MONITORED VISITS, YES.

Q DID SHE RESPOND TO YOUR INQUIRY?

A SHE DID.

Q AND WHAT DID SHE SAY?

A UM, I STARTED TO GIVE HER THE REASON THAT [1157] MS. VREEKEN HAD GIVEN ME; AND SHE DIDN'T RESPOND TO IT, SO I ASKED HER AGAIN.

I SAID, "I THINK I HAVE A RIGHT TO KNOW WHY I'M PLACED ON MONITORED VISITS."

AND SHE SAID, "BECAUSE I SAID SO," THAT I RECALL.

Q "BECAUSE I SAID SO."

DID YOU RESPOND TO HER STATEMENT AT ALL, "BECAUSE I SAID SO"?

A I SAID – OH, YEAH. ABSOLUTELY.

I SAID, "THAT'S NOT REALLY A REASON. I NEED TO KNOW – I'D LIKE TO KNOW WHY IT IS THAT I'M GOING – THAT I'M BEING PUT ON THESE."

I HIT HER UP ON THAT TWO OR THREE TIMES IN A ROW BECAUSE SHE WOULDN'T ANSWER THE QUESTION. THE ONLY TIME SHE ANSWERED IT WAS THE ONE TIME WHEN SHE SAID "BECAUSE I SAID SO."

Q OKAY. AND HOW DID THE CONVERSATION – WELL, LET ME ASK YOU THIS FIRST: WAS THERE ANYTHING ELSE THAT YOU RECALL, AS YOU SIT HERE TODAY, THAT PASSED BETWEEN THE TWO OF YOU DURING THAT TELEPHONE CALL?

A NOT DURING THE CALL, NO.

Q WHAT DO YOU MEAN NOT DURING THE CALL? WAS THERE –

A WELL, IT'S JUST THAT IT ENDED RATHER ABRUPTLY WITH HER HANGING UP ON ME WHILE I WAS STILL ASKING HER [1158] SOME QUESTIONS.

Q OKAY. SO SHE ACTUALLY MID-SENTENCE – WAS IT MID-SENTENCE?

A YES.

Q JUST HUNG UP THE PHONE?

A SHE HUNG UP THE PHONE ON ME.

* * *

[1160] Q DID YOU EVER EITHER NOTIFY OR FILE A COMPLAINT OR ANY OTHER COMMUNICATION WITH ANYBODY FURTHER UP THE CHAIN IN SOCIAL SERVICES BESIDES MS. DWOJAK?

* * *

A WHEN I SENT A LETTER TO MS. DWOJAK, I HAD COPIED SEVERAL PEOPLE TRYING TO, ONCE AGAIN, SEE WHERE ELSE I COULD GO UP THE LADDER. I HAD DONE SOME INVESTIGATION AND GOTTEN SOME NAMES, AND I MADE SURE THOSE LETTERS GOT OFF TO THOSE PEOPLE,

* * *

[1161] Q I'M GOING TO SHOW YOU AN APRIL 8TH LETTER, THE LAST PAGE OF THE LETTER.

IF YOU CAN LOOK THROUGH THE FIRST AND SECOND PAGE AND LET ME KNOW IF YOU RECOGNIZE THAT LETTER AS BEING THE LETTER THAT YOU SENT TO MS. DWOJAK AFTER YOUR TELEPHONE CONVERSATION WITH HER.

A YES, IT'S A LETTER I WROTE.

Q OKAY. AND IN THAT LETTER DID YOU DESCRIBE WHAT YOU DESCRIBED HERE FOR US TODAY.

A YES, I BELIEVE I HAVE.

* * *

[1162] Q IF YOU LOOK AT THE LAST PAGE OF THAT LETTER, DOES THAT REFRESH YOUR RECOLLECTION AS TO WHO IN THE CHAIN OF COMMAND AT SOCIAL SERVICES YOU C.C.'D THAT LETTER TO?

A YES. AND I CAN – YES, IT DOES.

Q AND WHO WAS THAT?

A MICHAEL MCMICHAEL. AND SO HE'S LISTED HERE AS PROGRAM MANAGER.

SO I HAD NEVER MET THIS GENTLEMAN; BUT, YOU KNOW, I ASKED SOME QUESTIONS, YOU KNOW, WHO WAS KIND OF IN CHARGE HERE, AND I BELIEVE HE WAS THAT PERSON.

* * *

[1163] Q DID ANYBODY AT SOCIAL SERVICES EVER RESPOND TO YOUR LETTER?

A NO.

* * *

[1169] Q NOW, THE LETTER THAT YOU WROTE TO MS. DWOJAK – OTHER THAN MS. DWOJAK AND MR. MCMICHAEL, WERE THERE

OTHERS ON YOUR LIST OF COPIES THERE THAT WERE IN ANY WAY THE SUPERIORS OR IN THE CHAIN OF TITLE – CHAIN OF TITLE – CHAIN OF COMMAND, SO TO SPEAK, AT SOCIAL SERVICES AGENCY?

* * *

IF I UNDERSTAND YOUR QUESTION, THE ONLY REASON I CHOSE THOSE PEOPLE IS I RECOGNIZED OR I HAD RESEARCHED THAT THESE WERE PEOPLE THAT WERE UP – HIGHER UP THAN MS. DWOJAK.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
	)	
VS.	)	
COUNTY OF ORANGE,	)	NO. 01CCO2379
MARCIE VREEKEN,	)	
ELAINE WILKINS, AND	)	
HELEN DWOJAK,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 28, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1236] (THE DEPOSITION TESTIMONY OF HELEN DWOJAK WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1240] "QUESTION: WHAT WAS YOUR JOB TITLE AT THE TIME YOU RETIRED?

"ANSWER: SENIOR SOCIAL SERVICES SUPERVISOR.

"QUESTION: ALL RIGHT. SO YOU WERE SERVING IN THAT CAPACITY FROM 1986 UNTIL YOU RETIRED IN 2006; IS THAT CORRECT?

"ANSWER: IT IS.

* * *

"QUESTION: WHAT WERE YOUR SPECIFIC JOB DUTIES AS A SENIOR SOCIAL [1241] SERVICES SUPERVISOR AS OF THE YEAR 2000?

"ANSWER: WELL, BEING MY JOB WAS TO TRAIN AND ASSIST SOCIAL WORKERS IN DOING THEIR JOB, MAINTAIN THE NEED FOR A PRIMARY GOAL – AND THAT IS THE PROTECTION OF CHILDREN. AND THEN ASSIST IN FAMILY REUNIFICATION; THAT IS, SO LONG AS WE COULD SAFELY PLACE A CHILD AT HOME, THAT'S WHAT WE WOULD DO.

"I DID A LOT OF TRAINING IN INVESTIGATIONS. I WAS THE TRAINING SUPERVISOR, SO I

TRAINED WORKERS ON HOW TO WRITE COURT REPORTS, HOW TO INVESTIGATE CASES, HOW TO DEAL WITH THE JUVENILE COURT.

* * *

[1242] "QUESTION: IS THERE ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY THAT WAS MORE RESPONSIBLE THAN YOU IN ACCOMPLISHING THOSE TASKS THAT YOU JUST OUTLINED FOR ME?

"ANSWER: YES. I HAD A PROGRAM MANAGER.

"QUESTION: WHO WAS THAT?

"ANSWER: AT THE TIME OF THIS CASE IT WAS MICHAEL MCMICHAEL.

"QUESTION: AND IS THAT THE PERSON TO WHOM YOU REPORTED?

"ANSWER: YES.

"QUESTION: WAS IT YOU OR MICHAEL MCMICHAEL WHO WAS RESPONSIBLE FOR TRAINING AND ASSISTING SOCIAL WORKERS IN DOING THEIR JOB?

"ANSWER: IT WAS ME.

* * *

[1243] "QUESTION: WAS IT YOU OR MR. MCMICHAEL WHO WAS RESPONSIBLE FOR

TRAINING STAFF ON HOW TO WRITE COURT REPORTS?

"ANSWER: IT WAS ME.

"QUESTION: WAS IT YOU OR MR. MCMICHAEL WHO WAS RESPONSIBLE FOR TRAINING STAFF ON HOW TO INVESTIGATE CASES?

"ANSWER: IT WAS ME.

"QUESTION: WAS IT YOU OR MR. MCMICHAEL WHO WAS RESPONSIBLE FOR TRAINING STAFF ON HOW TO DEAL WITH THE JUVENILE COURT?

"ANSWER: IT WAS ME.

"QUESTION: AND YOU WERE AN EMPLOYEE FOR ORANGE COUNTY, RIGHT?

"ANSWER: YES.

* * *

"QUESTION: DID YOUR JOB TITLE OR [1244] JOB DUTIES EVER CHANGE, OTHER THAN HOW YOU ALREADY EXPLAINED TO ME?

"ANSWER: NO.

"QUESTION: WERE YOU RESPONSIBLE FOR SUPERVISING SENIOR SOCIAL WORKER MARCIE VREEKEN?

"ANSWER: YES.

* * *

[1246] "QUESTION: AND YOU NEVER DISCIPLINED MS. VREEKEN FOR ANYTHING?

"ANSWER: NO.

"QUESTION: DID YOU EVER COUNSEL HER FOR ANYTHING?

"ANSWER: IN THE WAY OF DISCIPLINE?

"QUESTION: YES.

"ANSWER: NO.

"QUESTION: YOU NEVER SAW ANYTHING SHE DID THAT WAS SUBSTANDARD IN JOB PERFORMANCE?

"ANSWER: NO.

* * *

[1251] "QUESTION: BUT YOU NEVER GAVE MS. FOGARTY THE OPPORTUNITY TO TELL HER SIDE OF THE STORY, RIGHT?

"ANSWER: I DIDN'T CALL HER.

"QUESTION: DID YOU COMMUNICATE WITH HER IN ANY WAY, SHAPE, OR FORM, TO OBTAIN INFORMATION FROM HER ABOUT WHAT HAPPENED ON FEBRUARY 15, 2000?

"ANSWER: NO.

* * *

[1252] "QUESTION: ALL RIGHT. WHAT TRAINING, IF ANY, DID YOU PERSONALLY

PROVIDE TO MS. VREEKEN BEFORE FEBRUARY 15TH OF 2000?

"ANSWER: HOW TO WRITE COURT REPORTS, INTERVIEWING SKILLS, AND RISK ASSESSMENT.

"QUESTION: HOW MANY HOURS DID YOU SPEND TEACHING MS. VREEKEN INTERVIEWING SKILLS BEFORE FEBRUARY 15?

"ANSWER: FOUR HOURS.

"QUESTION: HOW MANY HOURS DID YOU SPEND TEACHING MS. VREEKEN RISK ASSESSMENT BEFORE FEBRUARY 15, 2000?

"ANSWER: APPROXIMATELY TWO

* * *

[1254] "QUESTION: WHAT WAS YOUR ROLE IN THE HARDWICK CASE IN PARTICULAR? WHAT WERE YOUR AREAS OF RESPONSIBILITY, THAT IS?

"ANSWER: SUPERVISING THE ASSIGNED SOCIAL WORKER TO MAKE SURE THAT REGULATIONS WERE FOLLOWED AND THAT THE INVESTIGATION WAS PROPERLY DONE AND THAT A COURT REPORT, A COMPREHENSIVE COURT REPORT, WAS GIVEN TO THE COURT.

"QUESTION: ANYTHING ELSE?

"ANSWER: NOT THAT I CAN THINK OF RIGHT NOW.

"QUESTION: IN DOING THOSE THINGS THAT YOU JUST DESCRIBED, YOU WERE ACTING IN THE PERFORMANCE OF YOUR OFFICIAL DUTIES OF THE ORANGE COUNTY SOCIAL [1255] SERVICES AGENCY, WERE YOU NOT?

"ANSWER: YES.

* * *

[1258] "QUESTION: WHAT ROLE DID YOU PLAY AS OF FEBRUARY 2000 IN MAKING THE RECOMMENDATIONS TO THE JUVENILE COURT IN MATTERS LIKE THE KENDALL AND PRESLIE HARDWICK MATTER?

"ANSWER: I DISCUSSED THE CASE WITH THE ASSIGNED WORKER. I APPROVED COURT REPORTS" – EXCUSE ME.

"I APPROVED THE COURT REPORTS.

"QUESTION: DID YOU APPROVE ALL OF THE COURT REPORTS IN THE KENDALL AND [1259] PRESLIE HARDWICK MATTER?

"ANSWER: YES.

"QUESTION: BEFORE APPROVING THOSE REPORTS, DID YOU READ THEM?

"ANSWER: YES.

* * *

"QUESTION: ALL RIGHT. NOW, WHEN YOU SAY THAT MS. VREEKEN HAD AUTHORITY TO

MAKE RECOMMENDATIONS BUT YOU MAKE THE DECISIONS, WHAT DECISIONS ARE YOU REFERRING TO?

"ANSWER: I APPROVE ALL OF THE RECOMMENDATIONS IN EVERY COURT REPORT IF I FIND THEM PROPER. IF NOT, WE TALK ABOUT IT.

* * *

[1260] "QUESTION: IN THE HARDWICK MATTER DID ANYONE EVER RECOMMEND TO YOU THAT THE CHILDREN BE RELEASED HOME TO THEIR MOTHER?

"ANSWER: NO.

"QUESTION: DID YOU, YOURSELF, SUGGEST THAT THE CHILDREN BE RELEASED HOME TO THEIR MOTHER?

"ANSWER: NO.

"QUESTION: WAS THERE ANYONE WITH YOUR AGENCY WHO WAS MORE RESPONSIBLE THAN YOU AS OF FEBRUARY 2000 TO ASSURE THE ACCURACY OF THE COURT REPORT ADDENDUMS AND OTHER REPORTS THAT WERE SUBMITTED TO THE JUVENILE COURT IN THE HARDWICK MATTER?

"ANSWER: NO.

* * *

[1262] "QUESTION: BY SIGNING THE REPORTS IN THE HARDWICK MATTER, YOU WERE APPROVING THEIR CONTENTS; CORRECT?

"ANSWER: CORRECT.

"QUESTION: AND YOU READ EACH OF THOSE REPORTS BEFORE SIGNING THEM?

"ANSWER: I DID.

* * *

[1264] "QUESTION: AND YOU CONTINUED TO SUPERVISE THIS CASE AFTER FEBRUARY 17?

"ANSWER: YES.

* * *

[1265] "QUESTION: WHEN THE REPORT STATES THAT THE MOTHER MADE A STATEMENT THAT SHE STRONGLY DENIED EVER MAKING AND THAT WAS THE BASIS FOR THE JUDGE REMOVING THE CHILDREN FROM HER CARE, ISN'T THAT SOMETHING THAT YOU WOULD WANT [1266] TO KNOW? YOU WOULD WANT TO INVESTIGATE TO MAKE SURE IT'S TRUTHFUL?

"ANSWER: NO.

* * *

[1267] "QUESTION: DID YOU, OR ANYONE ELSE WITH THE ORANGE COUNTY SOCIAL [1268] SERVICES AGENCY, TAKE ANY STEPS

WHATSOEVER AT ANY TIME TO INVESTIGATE DEANNA'S CLAIM THAT SHE DID NOT SAY THOSE THINGS AND IT WAS IN FACT MS. VREEKEN WHO DID?

"ANSWER: NO.

* * *

"QUESTION: * * * CAN YOU RECALL ANY OCCASION DURING YOUR LENGTHY CAREER IN SOCIAL SERVICES WHERE YOU TOOK THE WORD OF A PARENT OVER THE WORD OF A SOCIAL WORKER SUBORDINATE OF YOURS?

"ANSWER: I CAN'T RECALL ONE IN MY UNIT.

* * *

[1269] "QUESTION: DO YOU KNOW ANY BASIS FOR THE JUVENILE COURT TO REMOVE THE CHILDREN FROM THEIR MOTHER ON FEBRUARY 17TH, OTHER THAN THE STATEMENTS MADE BY MS. VREEKEN AND MS. WILKINS TO THE COURT THAT DAY?

"ANSWER: I DON'T KNOW.

* * *

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA FAILED TO SUPERVISE HER CHILDREN ADEQUATELY?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY [1270] EVIDENCE THAT DEANNA FAILED TO PROTECT HER CHILDREN?

"ANSWER: NO.

"QUESTION: WHAT EVIDENCE ARE YOU AWARE OF EXISTS TO SUPPORT THE ALLEGATIONS IN THE PETITION AGAINST DEANNA?

"ANSWER: IN CASES OF SEXUAL ABUSE, WHERE ONE PARENT IS THE PERPETRATOR, THE LEGAL LANGUAGE IS THAT THE OTHER PARENT FAILED TO PROTECT THE CHILD.

* * *

[1271] "QUESTION: AND SO YOUR PRACTICE, AS OF FEBRUARY 2000, WAS IN EVERY CASE OF ALLEGED SEXUAL ABUSE TO ALLEGE AS AGAINST THE OTHER PARENT – THAT IS, THE PARENT NOT ALLEGED TO HAVE SEXUALLY ABUSED THE CHILDREN – THAT THAT PARENT FAILED TO PROTECT THEIR CHILDREN?

"ANSWER: THAT'S CORRECT.

"QUESTION: AND THAT WOULD BE THE CASE WHETHER OR NOT THERE WAS ANY EVIDENCE TO SUPPORT – AT ALL TO SUPPORT THE ALLEGATION?

"ANSWER: THAT'S CORRECT.

* * *

[1272] "QUESTION: ARE YOU AWARE OF ANY WRITTEN POLICY WHICH POSES ANY LIMITATION ON THE ALLEGATIONS YOUR AGENCY CAN MAKE AGAINST A PARENT WHERE THERE IS NO EVIDENCE TO SUPPORT THE ALLEGATION?

"ANSWER: I'M NOT AWARE OF ANY.

"QUESTION: DID YOU EVER DISCLOSE TO THE JUVENILE COURT IN THE HARDWICK [1273] MATTER THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATIONS THAT DEANNA FAILED TO PROTECT HER CHILDREN?

"ANSWER: NO, I DIDN'T.

"QUESTION: DID YOU EVER DISCLOSE TO THE COURT THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATION THAT SHE FAILED TO SUPERVISE HER CHILDREN?

"ANSWER: NO, I DIDN'T.

"QUESTION: DID YOU EVER DISCLOSE TO THE JUVENILE COURT THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATION THAT DEANNA POSED A RISK OF PHYSICAL INJURY TO HER CHILDREN?

"ANSWER: NO.

* * *

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT THERE WAS A SUBSTANTIAL

DANGER TO THE PSYCHOLOGICAL OR EMOTIONAL HEALTH OF THE CHILDREN IF THEY WERE [1274] RETURNED TO THEIR MOTHER AS OF FEBRUARY 18TH, 2000?

"ANSWER: NO.

* * *

"QUESTION: YOUR AGENCY HAS A TREMENDOUS AMOUNT OF POWER TO AFFECT A PERSON'S CHILDREN AND FAMILY, DON'T YOU?

"ANSWER: SOME SEE IT THAT WAY.

* * *

[1275] "QUESTION: IS THERE ANYONE ELSE BESIDES YOU AND MS. VREEKEN WHO ARE AUTHORIZED TO RELEASE THE CHILDREN TO THEIR PARENT IN THE HARDWICK CASE?

"ANSWER: NO.

"QUESTION: DID YOU EVER AUTHORIZE THE RELEASE OF KENDALL OR PRESLIE HARDWICK BACK TO THEIR MOTHER?

[1276] "ANSWER: NO.

"QUESTION: DID MS. VREEKEN?

"ANSWER: NOT TO MY KNOWLEDGE.

"QUESTION: DID ANYONE ELSE WITH YOUR AGENCY?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT EXISTED AS OF FEBRUARY 2000 THAT DEANNA WAS IN ANY MANNER AN UNSUITABLE CARETAKER?

"ANSWER: NO.

* * *

[1278] "QUESTION: DO YOU AND MS. VREEKEN OCCASIONALLY MEET TO DISCUSS THE HARDWICK CASE?

"ANSWER: IN MY OFFICE, YES.

* * *

"QUESTION: DID THE TWO OF YOU AT ALL TIMES AGREE ON THE COURSE OF ACTION [1279] THAT SHE WAS TAKING IN THE HARDWICK CASE?

"ANSWER: WELL, AT THAT TIME SHE WAS STILL INVESTIGATING INFORMATION. SHE HADN'T MADE A DETERMINATION OF WHAT SHE WAS GOING TO RECOMMEND OR ANY CHANGES IN THE REPORT, THE CASE PLAN, OR ANYTHING.

"QUESTION: BUT WHEN I SAY COURSE OF ACTION, I GUESS THE COURSE OF ACTION SHE

WAS UNDERTAKING WAS SHE WAS DOING FURTHER INVESTIGATION; RIGHT?

"ANSWER: CORRECT.

"QUESTION: AND SHE WAS PREPARING AND SUBMITTING TO THE JUVENILE COURT NUMEROUS COURT REPORT ADDENDUMS AND OTHER REPORTS, CORRECT?

"ANSWER: THAT'S CORRECT.

"QUESTION: AND THE TWO OF YOU AT ALL TIMES AGREED ON THAT COURSE OF ACTION?

"ANSWER: YES.

"QUESTION: AND THE TWO OF YOU AT ALL TIMES AGREED ON THE COURSE OF ACTION THAT SHE WAS TAKING IN GENERAL?

"ANSWER: YES.

[1280] "QUESTION: THE TWO OF YOU AGREED ON HOW THE CASE WOULD BE HANDLED?

"ANSWER: YES.

"QUESTION: EVERY STEP OF THE WAY?

"ANSWER: YES.

* * *

"QUESTION: LITERALLY, YOU CAN'T TELL THE JUDGE EVERY FACT IN EVERY CASE, CAN YOU?

"ANSWER: EVERY SIGNIFICANT FACT GOES INTO THAT COURT REPORT.

"QUESTION: SO WHO DECIDES WHAT'S SIGNIFICANT?

"ANSWER: THE SOCIAL WORKER AND I DECIDE IT.

"QUESTION: AND THE TWO OF YOU AGREED ON WHAT FACTS WERE SIGNIFICANT ENOUGH TO MAKE IT INTO THE REPORTS THAT WERE SUBMITTED TO THE JUVENILE COURT IN THIS CASE, CORRECT?

"ANSWER: THAT'S CORRECT.

[1281] "QUESTION: THE TWO OF YOU AGREED ON WHAT INFORMATION WOULD BE DISCLOSED TO THE JUVENILE COURT, CORRECT?

"ANSWER: YES.

"QUESTION: AND THE TWO OF YOU AGREED ON WHERE THE CHILDREN SHOULD BE KEPT AND FOR HOW LONG?

"ANSWER: WHERE THEY SHOULD BE KEPT WAS AGREED UPON.

"QUESTION: DID YOU HAVE A DISAGREEMENT ABOUT THE DURATION OF THAT DETENTION?

"ANSWER: NO. WE JUST DIDN'T KNOW FOR HOW LONG.

"QUESTION: BUT YOU BOTH AGREED TO CONTINUE TO DETAIN THE CHILDREN INDEFINITELY, FIRST AT ORANGEWOOD, AND THEN IN FOSTER CARE; CORRECT?

"ANSWER: YES.

* * *

[1287] "QUESTION: DURING THE COURSE OF MS. VREEKEN'S HANDLING OF THE HARDWICK MATTER, SHE CAME TO RELY UPON YOU TO BACK HER UP, DID SHE NOT?

"ANSWER: I'M HER SUPERVISOR. IT'S MY JOB TO DO THAT."

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 1, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1476] (THE DEPOSITION TESTIMONY OF JOYCE REILY WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1477] "QUESTION: AS OF FEBRUARY 17, 2000, YOU WERE DEPUTY COUNTY COUNSEL REPRESENTING THE SOCIAL SERVICES AGENCY IN THE JUVENILE COURT PROCEEDING RELATING TO KENDALL AND PRESLIE HARDWICK; CORRECT?

"ANSWER: YES.

* * *

[1478] "QUESTION: NOW, DURING YOUR HANDLING OF THE HARDWICK MATTER, DID YOU EVER BECOME AWARE OF ANY EVIDENCE THAT DEANNA HAD HERSELF SEXUALLY ABUSED EITHER OF HER CHILDREN?

"ANSWER: NO.

"QUESTION: DID YOU EVER DISCOVER ANY EVIDENCE DURING YOUR HANDLING OF THE HARDWICK MATTER THAT DEANNA HAD FAILED TO PROPERLY SUPERVISE EITHER OF HER CHILDREN?

"ANSWER: NO.

"QUESTION: OR THAT SHE HAD FAILED TO PROTECT EITHER OF HER CHILDREN?

"ANSWER: NO.

[1479] "QUESTION: OR THAT DEANNA PRESENTED A RISK OF SERIOUS PHYSICAL HARM TO THE CHILDREN?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANYONE FROM YOUR OFFICE DISCLOSING TO THE JUVENILE COURT AT ANY TIME THAT THERE WAS NO EVIDENCE TO SUPPORT ANY PARTICULAR ALLEGATION IN THE PETITION IN THE HARDWICK CASE?

"ANSWER: NO.

"QUESTION: OR ANY AMENDMENT THERETO?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY OTHER EMPLOYEE OR REPRESENTATIVE OF THE SOCIAL SERVICES AGENCY EVER DISCLOSING TO THE JUVENILE COURT IN THE HARDWICK CASE THAT THERE WAS A LACK OF EVIDENCE TO SUPPORT ANY PARTICULAR ALLEGATION IN THE PETITION?

"ANSWER: NO.

"QUESTION: OR ANY AMENDMENT TO THAT PETITION?

"ANSWER: NO.

* * *

[1481] "QUESTION: YOU WERE PERSONALLY PRESENT AT THE JUVENILE COURT HEARING ON FEBRUARY 17, 2000, WERE YOU NOT?

"ANSWER: ACCORDING TO THIS TRANSCRIPT, YES.

"QUESTION: DO YOU RECALL SOCIAL WORKER MARCIE VREEKEN BEING PRESENT?

"ANSWER: YES.

"QUESTION: ALL RIGHT. I WOULD LIKE TO INVITE YOUR ATTENTION TO THE LANGUAGE AT THE BOTTOM OF THIS MINUTE ORDER WHICH STATES: 'COURT, COUNSEL, AND SOCIAL WORKER CONFERRED OFF RECORD.' DO YOU SEE THAT?

"ANSWER: YES.

* * *

[1482] "QUESTION: AND WOULD YOU AGREE THEN THAT THE OFF-RECORD CONVERSATION THAT IS DOCUMENTED IN THE MINUTE ORDER OCCURRED PRIOR TO THE COURT GOING ON THE RECORD ON FEBRUARY 17, 2000?

"ANSWER: YES.

"QUESTION: NOW, THE TRANSCRIPT, EXHIBIT 29, IS A RECORD OF THE ON-RECORD

HEARING BEFORE REFEREE BISCHOFF THAT DAY; CORRECT?

"ANSWER: YES.

"QUESTION: DID YOUR REVIEW OF THIS TRANSCRIPT HELP REFRESH YOUR MEMORY ABOUT WHAT THE SOCIAL WORKER TOLD REFEREE BISCHOFF DURING THE OFF-RECORD CONFERENCE ON FEBRUARY 17, 2000?

"ANSWER: ONLY TO THE EXTENT IT'S IN THE TRANSCRIPT.

"QUESTION: OKAY. TO WHAT EXTENT DID IT HELP REFRESH YOUR MEMORY?

"ANSWER: IF I REMEMBER, THAT WAS [1483] WHAT TRIGGERED REFEREE BISCHOFF MAKING THE ORDER THAT HE MADE.

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE PRESENTED TO THE COURT THAT DAY THAT IT WAS IN ANY WAY NECESSARY TO REMOVE KENDALL FROM HER MOTHER'S CUSTODY, OTHER THAN THESE STATEMENTS BY THE SOCIAL WORKER?

"ANSWER: NO. I CAN'T RECALL ANYTHING.

* * *

"QUESTION: OKAY. LET'S MARK FOR IDENTIFICATION AS EXHIBIT 34 A MEMO THAT WAS INCLUDED IN THE JUVENILE COURT FILE.

"BY THIS MEMO, MS. VREEKEN, THE SOCIAL WORKER, THE SENIOR SOCIAL WORKER ON THIS CASE, WAS ASKING YOU TO AMEND [1484] THE PETITION AGAIN; CORRECT?

"ANSWER: YES.

"QUESTION: AND THAT WOULD HAVE BEEN TO PREPARE THE SECOND – WHAT WOULD BE THE SECOND AMENDED PETITION, CORRECT?

"ANSWER: YES.

"QUESTION: AND IT WAS MS. VREEKEN WHO PROVIDED THIS INFORMATION TO YOU ABOUT WHAT ALLEGEDLY OCCURRED ON FEBRUARY 15, 2000; CORRECT?

"ANSWER: YES.

* * *

"QUESTION: AND IT WAS MS. VREEKEN WHO CONVEYED TO YOU THAT DEANNA TOLD HER CHILDREN THAT THEIR FATHER WAS TRYING TO TAKE THEM AWAY FROM HER AND PUT THEM IN A FOSTER HOME, CORRECT?

"ANSWER: THAT'S WHAT – YES.

"QUESTION: AND IT WAS BECAUSE THAT INFORMATION WAS CONVEYED TO YOU BY [1485] MARCIE VREEKEN THAT YOU IN FACT INCLUDED THAT ALLEGATION IN THE SECOND AMENDED PETITION, CORRECT?

"ANSWER: YES.

* * *

"QUESTION: SHE WAS ASKING YOU TO ALLEGE THAT THERE WAS A SUBSTANTIAL DANGER TO THE PSYCHOLOGICAL AND EMOTIONAL HEALTH OF THE CHILDREN DUE TO THEIR MOTHER'S NEGATIVE STATEMENTS ABOUT THE CHILDREN'S FATHER; IS THAT RIGHT?

"ANSWER: YES.

* * *

[1487] "QUESTION: YOU, IN FACT, AMENDED THE PETITION AS MS. VREEKEN REQUESTED; RIGHT?

"ANSWER: YES.

"QUESTION: AND YOU INCLUDED THE ALLEGATIONS SHE REQUESTED IN THAT SECOND AMENDED PETITION, CORRECT?

"ANSWER: YES.

"QUESTION: EXHIBIT 30 IS THE SECOND AMENDED PETITION THAT YOU FILED AT MS. VREEKEN'S REQUEST, IS IT NOT?

"ANSWER: YES.

"QUESTION: AND YOU CAUSED THIS SECOND AMENDED PETITION TO BE FILED WITH THE JUVENILE COURT ON FEBRUARY 23, 2000?

"ANSWER: YES.

"QUESTION: DID YOU INTEND FOR [1488] THE JUVENILE COURT TO BELIEVE THE CONTENTS OF THIS DOCUMENT?

"ANSWER: YES.

"QUESTION: AND YOU INTENDED THE JUVENILE COURT TO RELY ON THE CONTENTS OF THIS DOCUMENT IN MAKING HIS DECISIONS IN THIS CASE?

"ANSWER: YES.

"QUESTION: AND YOU ADDED PRESLIE TO THIS AMENDMENT, DID YOU NOT?

"ANSWER: YES.

"QUESTION: NOW, A PERIOD OF SIX DAYS HAD ELAPSED BETWEEN FEBRUARY 17TH WHEN PRESLIE WAS REMOVED FROM HER MOTHER'S CUSTODY AND THE FEBRUARY 23RD FILING OF THIS AMENDED PETITION; CORRECT?

"ANSWER: YES.

* * *

[1490] MR. MCMILLAN: I HAVE PLENTY OF READINGS, OR WE CAN READ THE RESPONSES TO THE REQUEST FOR ADMISSIONS. AND IF WE DO THAT, I WOULD REQUEST A PREINSTRUCTION TO THE JURY AS TO WHAT ADMISSIONS ARE.

THE COURT: WHY DON'T WE DO THAT.

I CAN TELL THE LADIES AND GENTLEMEN OF THE JURY THAT THERE IS ANOTHER VERSION OF PRETRIAL PREPARATION. WE'VE ALREADY LEARNED ABOUT A DEPOSITION, AND YOU'VE HAD SEVERAL EXAMPLES OF THE READINGS FROM A DEPOSITION.

[1491] THERE IS ALSO A PRETRIAL PROCEDURE THROUGH WHICH ONE SIDE CAN ASK THE OTHER TO ADMIT THE TRUTH OF A STATEMENT OF FACT OR TO ADMIT THE GENUINENESS OF A DOCUMENT.

I THINK IN THIS INSTANCE WE'RE GOING TO HAVE CIRCUMSTANCES REPORTED TO YOU IN WHICH CERTAIN STATEMENTS OF FACT WERE TENDERED BY THE PLAINTIFF TO THE DEFENDANT, AND THE DEFENDANT IN RESPONSE THERETO SAID I ADMIT THAT IS TRUE. WHEN THAT BE THE CASE AND YOU HEAR THAT INFORMATION, THEN OF COURSE YOU TAKE THAT AS BEING A FACT IN THIS CASE.

SO MS. SUTHERLAND WILL READ YOU THE STATEMENT THAT WAS TENDERED; AND IN EACH INSTANCE I BELIEVE THE RESPONSE WAS YES, THAT IS TRUE.

MS. SUTHERLAND:

* * *

THESE ARE PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT HELEN DWOJAK.

REQUEST FOR ADMISSION NUMBER ONE: ADMIT THAT YOU APPROVED THE FEBRUARY 17, 2000, COURT REPORT ADDENDUM PREPARED BY DEFENDANT MARCIE VREEKEN IN THE MATTER OF HARDWICK, KENDALL AND PRESLIE, MINORS, ORANGE COUNTY SUPERIOR COURT, CASE NUMBER DP-002001 AND DP-002002.

THE RESPONSE: ADMIT.

* * *

[1492] REQUEST NUMBER TWO: ADMIT THAT YOU APPROVED THE FEBRUARY 23RD, 2000, DETENTION HEARING REPORT PREPARED BY DEFENDANT MARCIE VREEKEN IN THE SAME MATTER.

REQUEST NUMBER THREE – AND THAT WAS AN ADMIT. ADMIT THAT YOU APPROVED THE MARCH 1 COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER ADMISSION NUMBER FOUR: ADMIT THAT YOU APPROVED THE

MARCH 14, 2000, COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER FIVE: ADMIT THAT YOU APPROVED THE MARCH 29, 2000, COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER SIX: ADMIT THAT YOU APPROVED THE APRIL 4, 2000, COURT REPORT ADDENDUM PREPARED BY DEFENDANT MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER SEVEN: ADMIT THAT YOU APPROVED THE APRIL 17, 2000, COURT REPORT ADDENDUM PREPARED BY [1493] MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

ADMIT THAT YOU APPROVED THE –

NUMBER EIGHT: ADMIT THAT YOU APPROVED THE MAY 19, 2000, COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER NINE: ADMIT THAT YOU APPROVED THE MAY 19, 2000, AGREEMENT, 301 AGREEMENT, IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER 15: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE MATTER OF HARDWICK, KENDALL AND PRESLIE, MINORS, SAME CASE NUMBERS.

ADMIT.

NUMBER 16: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE SAME MATTER.

ADMIT.

REQUEST NUMBER 17: ADMIT THAT YOU DID NOT MAKE THE DECISION TO INSTITUTE THE DEPENDENCY PROCEEDINGS IN THAT MATTER.

[1494] RESPONSE: ADMIT.

REQUEST NUMBER 19: ADMIT THAT YOU WERE AT ALL TIMES ACTING IN THE PERFORMANCE OF YOUR OFFICIAL DUTIES IN YOUR HANDLING OF THE HARDWICK MATTER.

ADMIT.

REQUEST NUMBER 23: ADMIT THAT YOU APPROVED THE DECISIONS AND ACTS OF DEFENDANTS MARCIE VREEKEN AND ELAINE WILKINS.

ADMIT.

REQUEST NUMBER 28: ADMIT THAT YOU NEVER DISCLOSED KNOWN FALSE STATEMENTS BY OTHER SOCIAL WORKERS TO THE JUVENILE COURT IN THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 31: ADMIT THAT PLAINTIFF, DEANNA R. FOGARTY-HARDWICK, AT NO TIME PRESENTED A RISK OF SERIOUS PHYSICAL HARM TO THE CHILDREN IN THE HARDWICK MATTER.

RESPONSE: ADMIT.

* * *

[1495] TURNING NOW TO EXHIBIT 237, PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT MARCIE VREEKEN.

REQUEST NUMBER 13: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

NUMBER 14: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANTS ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

[1496] RESPONSE: ADMIT.

REQUEST NUMBER 15: ADMIT THAT YOU DID NOT MAKE THE DECISION TO INSTITUTE THE DEPENDENCY PROCEEDINGS IN THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 17: ADMIT THAT YOU WERE AT ALL TIMES ACTING IN THE PERFORMANCE OF YOUR OFFICIAL DUTIES IN HANDLING THE HARDWICK MATTER.

RESPONSE: ADMIT.

FINALLY, TURNING TO EXHIBIT 239, PLAINTIFF'S REQUEST FOR ADMISSIONS DIRECTED TO THE ORANGE COUNTY SOCIAL SERVICES AGENCY ITSELF.

REQUEST NUMBER EIGHT: ADMIT THAT YOU CONTINUED TO DETAIN THE CHILDREN IN THE HARDWICK MATTER UNTIL ON OR ABOUT MAY 19, 2000.

ADMIT.

REQUEST NUMBER 16: ADMIT THAT, AS OF FEBRUARY 17, 2000, IT WAS YOUR POLICY TO INTERVIEW CHILDREN WITHOUT ALLOWING A PARENT TO BE PRESENT.

RESPONSE: ADMIT.

ADMIT THAT AS OF FEBRUARY 17, 2000, IT WAS YOUR CUSTOM, MEANING A PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICE, TO INTERVIEW CHILDREN WITHOUT ALLOWING A PARENT TO BE PRESENT.

RESPONSE: ADMIT.

REQUEST NUMBER 18: ADMIT THAT THE CHILDREN IN [1497] THE HARDWICK MATTER WERE INTERVIEWED ON NUMEROUS OCCASIONS WITHOUT ALLOWING A PARENT TO BE PRESENT.

RESPONSE: ADMIT.

REQUEST NUMBER 31: ADMIT THAT DEFENDANT MARCIE VREEKEN WAS AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN HER HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 32 IS THE SAME REQUEST AS TO DEFENDANT ELAINE WILKINS, AND REQUEST NUMBER 34 IS THE SAME AS TO HELEN DWOJAK.

AND THAT CONCLUDES MY READING OF THAT.

MR. STEBENS: I'LL OBJECT THAT THE LATTER OF THOSE READINGS REFLECTS THAT AN INAPPROPRIATE ENTITY. THE RESPONSE WAS MADE BY THE COUNTY OF ORANGE. THE SOCIAL SERVICES AGENCY IS A SPECIFIC DIVISION OF THAT.

THE COURT: THE OBJECTION IS OVERRULED.

* * *

[1498] PETER HERMES,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

Q JUST BRIEFLY, CAN YOU DESCRIBE FOR US JUST A LITTLE SUMMATION OF YOUR BACKGROUND?

A I'M A LAWYER. I'VE BEEN A LAWYER SINCE 1974, [1499] APPROXIMATELY 33 YEARS. AND I HAVE SPECIALIZED ALMOST EXCLUSIVELY IN THOSE 33 YEARS AS A FAMILY LAW LAWYER.

* * *

Q IN THOSE 33 YEARS OF PRACTICE, DID YOU EVER HAVE OCCASION TO OPERATE IN DEPENDENCY COURT?

A YES.

* * *

[1500] Q AND ONE OF THOSE CASES WAS THE CASE WITH MS. DEANNA FOGARTY, RIGHT?

A CORRECT.

Q AND AT WHAT POINT DID YOU COME INTO THE CASE TO REPRESENT – OR TO ASSIST IN THE REPRESENTATION OR REPRESENT MS. FOGARTY?

A IT WAS ON OR ABOUT FEBRUARY 20TH, I BELIEVE, OF THE YEAR 2000. IT WAS IMMEDIATELY AFTER THE DETENTION HEARING, I BELIEVE IT WAS, OF FEBRUARY 17TH.

Q THE ONE WHERE HER CHILDREN HAD BEEN TAKEN AWAY?

A THAT'S CORRECT. REMOVED.

Q AND IN WHAT CAPACITY WERE YOU BROUGHT INTO THE CASE?

A I WAS BROUGHT IN TO HANDLE THE TRIAL AND LITIGATION OF THE ENTIRE MATTER IN THE DEPENDENCY COURT AND THEN PICK UP THE WHATEVER REMAINED AFTERWARDS IN THE FAMILY LAW COURT, SINCE WE

ANTICIPATED THAT AFTER THE DEPENDENCY ACTION WOULD BE COMPLETED THAT IT WOULD GO INTO FAMILY LAW AND I WOULD CONTINUE ON WITH THE CUSTODY ASPECTS AND THE REST OF THE CASE AS WELL.

* * *

[1501] Q DURING THAT TIME PERIOD FROM FEBRUARY 20TH UNTIL LATE APRIL OR MAY OF 2000, DID YOU FREQUENTLY APPEAR AT COURT HEARINGS?

A I APPEARED AT EVERY COURT HEARING.

Q EVERY COURT HEARING?

A YES. THERE WERE APPROXIMATELY, I WANT TO SAY – I THINK THERE WAS ABOUT 20 ACTUAL TRIAL DAYS AND COURT HEARINGS WHERE I PARTICIPATED, GIVE OR TAKE A FEW.

[1502] Q OKAY.

A VERY EXTENSIVE.

Q AND DURING THOSE COURT HEARINGS, THE TIMES THAT YOU WERE SPENDING THE DAY IN COURT, DID YOU HAVE OCCASION TO MEET ANY OF THE DEFENDANTS IN THIS CASE?

A YOU'RE POINTING TO DEFENDANTS.

ARE YOU TALKING ABOUT MS. WILKINS AND MS. VREEKEN?

Q YES.

A EVERY DAY THAT THEY WERE THERE, WE WOULD HAVE SOME INTERACTION. MORE INTERACTION EARLIER ON, LESS IN THE MIDDLE, AND MANY MORE TOWARDS THE END.

* * *

[1514] Q NOW, HOW DID YOU FIND OUT ABOUT THE EXISTENCE OF THIS LETTER?

A I CALLED DR. MITCHELL AND SHE TOLD ME SHE HAD SENT IT.

Q OKAY.

A SHE HAD SAID SHE SENT IT THAT MORNING TO SOCIAL SERVICES.

Q AND WHEN YOU CALLED HER, DID SHE TELL YOU WHAT THE SUBSTANCE OF THE LETTER WAS?

* * *

THE WITNESS: SHE DESCRIBED IN DETAIL HOW THE CHILDREN WERE EMOTIONALLY, HOW THEY WERE BREAKING DOWN, HOW THEY WERE NOT HANDLING PLACEMENT. AND THERE WAS A RECOMMENDATION THAT THEY DO SOMETHING ABOUT GETTING BACK INTO THERAPY WITH HER AND REMOVE THEM FROM PLACEMENT, WAS [1515] BASICALLY HER SUGGESTION.

* * *

THE WITNESS: IT BASICALLY WASN'T WORKING.

BY MR. MCMILLAN:

Q CORRECT ME IF I'M WRONG, BUT YOU WERE IN THE MIDST OF TRIAL WHEN THIS WAS HAPPENING; RIGHT?

A YES.

Q WOULD THAT LETTER HAVE BEEN -- OR THAT INFORMATION CONVEYED IN THAT LETTER – WOULD THAT HAVE BEEN SOMETHING THAT WAS MATERIAL TO WHAT WAS GOING ON IN THE CASE AT THAT TIME?

A YES.

Q WOULD THAT HAVE BEEN SOMETHING THAT YOU WOULD HAVE CONSIDERED TO BE EXCULPATORY EVIDENCE?

A YES.

* * *

THE ISSUE BEFORE THE COURT WAS THE BASIS FOR PLACEMENT, WHETHER THEY SHOULD BE PULLED OUT OF PLACEMENT OR RETURNED TO MOTHER, AND THE PSYCHOLOGICAL MAKEUP OF THE CHILDREN.

AND WHAT WAS IMPACTING THEM THROUGH PLACEMENT WAS EXTREMELY IMPORTANT, BECAUSE SOCIAL SERVICES HAD THE [1516] ABILITY AT ANY TIME TO RECOMMEND TO THE

COURT TO REMOVE THESE CHILDREN AND IT DIDN'T HAPPEN. AND THEY HELD BACK THIS INFORMATION THAT THEY HAD THAT SHOULD HAVE BEEN EITHER PRODUCED IN LETTER FORM, OR AT LEAST IN A REPORT FORM, OR AN ORAL MOTION TO THE COURT INDICATING WE HAVE A PROBLEM, THIS IS WHAT WE NEED TO DO. AND THEY NEVER DID THAT.

Q BESIDES THIS LETTER, THIS MARJORIE MITCHELL LETTER, IS THERE ANY OTHER EXCULPATORY INFORMATION THAT YOU KNOW OF THAT WAS WITHHELD?

A YES.

Q OKAY. WHY DON'T YOU GO AHEAD AND EXPLAIN IT FOR ME.

A IT'S MORE THAN ONE, SO I'LL TAKE THE FIRST ONE FIRST.

Q OKAY.

A AT THE FEBRUARY 17TH HEARING, AND AFTERWARDS, THROUGH TRIAL, THERE WAS TWO THINGS THAT WAS NOT PRESENTED BY THE – AT LEAST TWO THINGS NOT PRESENTED BY THE SOCIAL SERVICES.

* * *

[1517] Q SO IN THE COURSE OF PREPARING FOR TRIAL OR THE [1518] HEARING, YOU REVIEWED A LOT OF DATA, YOU SPOKE WITH

MS. VREEKEN AND MS. WILKINS AND MS. DWOJAK.

AND IN THE COURSE OF ALL OF THAT PREPARATION, THOSE CONVERSATIONS, WERE YOU ABLE TO DISCOVER THAT THERE WERE MATERIAL ITEMS OF EVIDENCE THAT HAD NOT BEEN PRESENTED TO THE COURT THAT WOULD HAVE BEEN EXCULPATORY IN NATURE?

A YES.

Q OKAY. GO AHEAD AND GIVE ME THAT.

* * *

A * * * GOING BACK TO YOUR QUESTION, I REMEMBER INTERVIEWING AND DISCUSSING WITH MS. VREEKEN A SITUATION CONCERNING MR. DELGADIO. HE WAS THE COURT-APPOINTED MONITOR. AND MY CLIENT WAS TO FOLLOW CERTAIN RULES FOR VISITATION TO FACILITATE THE CHILDREN GOING TO THEIR FATHER UNDER MONITORED CIRCUMSTANCES. THIS IS BEFORE THE 17TH. AND IN THE INTERVIEW, I WAS TOLD BY MS. VREEKEN [1519] WHAT HAD HAPPENED.

AND WHAT HAD HAPPENED WAS THAT MY CLIENT, SHE ADMITTED – AND SHE ADMITTED IN HER TESTIMONY LATER ON – THAT SHE FOLLOWED THE RULES. SHE TOOK THE CHILDREN TO THE MONITOR.

THE RULES WERE YOU DELIVER THEM TO THE MONITOR. THE MONITOR THEN TAKES OVER AND DEALS WITH THE CHILDREN AND FATHER, BECAUSE AT THAT TIME THE CHILDREN DID NOT WANT TO SEE THEIR FATHER BECAUSE OF WHAT WAS GOING ON. THEN SHE WOULD LEAVE.

WELL, ON THIS VISITATION ON THE 13TH, JUST BEFORE THIS – THE 15TH MEETING AND THEN THE 17TH HEARING, MY CLIENT TOOK THE CHILDREN TO MR. DELGADIO. THE CHILDREN WERE GIVEN TO HIM. SHE LEFT, JUST FOLLOWING THE RULES.

AND SHE SAID SHE FOLLOWED THE RULES, THERE WAS NO PROBLEMS, THERE WAS NO ALIENATION BY MY CLIENT.

Q MS. VREEKEN SAID THAT?

A YES.

AND THEN THERE WAS DISCUSSION ABOUT HOW THE CHILDREN CLAIMED THAT MR. DELGADIO IS NOT PROTECTING THEM BECAUSE THE FATHER WHISPERED IN ONE OF THE KIDS' EARS – I THINK IT WAS KENDALL'S – MADE A THREAT TO HER. SHE COMPLAINED TO THE MONITOR AND THE MONITOR SORT OF SAID, "WELL, I DIDN'T HEAR IT."

Q WHEN YOU SAID SHE COMPLAINED –

[1520] A THE DAUGHTER.

Q – WAS IT KENDALL THAT COMPLAINED TO THE MONITOR, OR WHO COMPLAINED TO THE MONITOR?

A KENDALL COMPLAINED TO THE MONITOR, THEN IT GOT BACK TO MS. VREEKEN. AND I'M NOT SURE HOW IT GOT BACK TO MS. VREEKEN.

* * *

[1522] Q LET'S MOVE ON TO THE SECOND INSTANCE WHERE EXCULPATORY EVIDENCE WAS WITHHELD.

* * *

[1524] Q DID THEY GIVE YOU THE RECORDS YOU WERE LOOKING FOR?

A SOME OF THE RECORDS WE GOT; SOME WE DID NOT. AND THE CRITICAL ONE I DID NOT GET.

Q WHAT WAS THE CRITICAL ONE?

A THE CRITICAL RECORD THAT I DID NOT GET WAS A MEMO OR INCIDENT REPORT THAT WAS SUPPOSED TO BE DRAFTED AND SUBMITTED BY MS. WILKINS, THE PERSON WHO ALLEGEDLY HEARD MY CLIENT MAKE CERTAIN STATEMENTS.

DURING THE COURSE OF THE TRIAL, THEY REFUSED TO [1525] GIVE US THAT INFORMATION. AND AT ONE POINT THEY CLAIMED

THAT THERE WAS NO SUCH MEMO; MS. WILKINS HADN'T PREPARED IT.

* * *

Q DID YOU EVER FIND THAT MEMO?

A NO. I NEVER RECEIVED A COPY OF THE MEMO.

* * *

[1528] Q WHAT WAS IT DOING TO MOM?

A IT WAS – IT – IT EMOTIONALLY DEVASTATED HER. SHE WENT FROM THIS VERY BEAUTIFUL, VIBRANT, GOOD-HUMORED WOMAN DURING THE COURSE OF THIS TRIAL, WITHIN LIKE TWO OR THREE MONTHS, TO JUST ALMOST SHE COULDN'T TALK AT THE END. SHE – I MEAN, SHE COULDN'T FOCUS ON ANYTHING. SHE BECAME DEPRESSED. WE HAD A HARD TIME TO DEAL WITH HER EMOTIONALLY.

WE HAVE TO PREPARE A CASE. WE NEED A CLIENT. SHE WAS BREAKING DOWN. I MEAN, SHE HAD TO GO SEE A THERAPIST. SHE COULDN'T EVEN BEAR SEEING HER CHILDREN WHEN SHE WOULD VISIT ON THESE MONITORED TIMES BECAUSE OF WHAT SHE SAW THAT WAS HAPPENING TO THESE KIDS.

Q WAS THAT ONE OF THE MOTIVATIONS THAT FACTORED INTO THE DECISION TO TRY

TO GET SOME SORT OF SPEEDY RESOLUTION OR SETTLEMENT?

A YES. THAT WAS ONE.

* * *

[1532] Q OKAY. AT SOME POINT DID YOU ACTUALLY SEND OR NOTIFY OR COMPLAIN TO ANYBODY AT SOCIAL SERVICES ABOUT WHAT YOU PERCEIVED GOING ON IN THIS PARTICULAR CASE?

A YES.

Q HOW DID YOU GO ABOUT VOICING THAT COMPLAINT?

A WELL, I DID IT VERBALLY TO MS. VREEKEN, MS. DWOJAK ON NUMEROUS OCCASIONS, TO TRY TO RECTIFY THE WRONG THAT WAS – RESULTED FROM WHAT THEY DID OR DIDN'T DO.

Q DID YOU EVER GO UP THE CHAIN?

A YES, I DID. THEN I WROTE A LETTER TO, I BELIEVE – I'M NOT SURE HOW HIGH I WENT, BUT SOMEWHERE MUCH HIGHER THAN MS. DWOJAK, IN THE DEPARTMENT OF CHILDREN'S SERVICES FOR THE COUNTY, AND BASICALLY GAVE [1533] THEM A LETTER SUMMARIZING WHAT I BELIEVED TOOK PLACE IN AN ATTEMPT TO TRY TO AGAIN RESOLVE THIS WITHOUT GOING ANY FURTHER TO GET THIS CASE OUT OF DEPENDENCY AND GET THIS

CASE – KIDS BACK TO THEIR MOTHER AND MOVE TO THE FAMILY LAW COURT.

Q AND DO YOU REMEMBER WHO YOU SENT IT TO?

A I HAVE A COPY OF IT. I DON'T REMEMBER RIGHT NOW. I CAN READ IT.

Q IF YOU WERE TO LOOK AT THE COPY, WOULD THAT REFRESH YOUR RECOLLECTION AS TO WHO YOU SENT IT TO?

A I SENT THE LETTER TO JOYCE REILY. SHE WAS A DEPUTY ORANGE COUNTY COUNSEL. AND THEN I SENT A COPY OF THIS LETTER CC'D TO MY CLIENT; RITA SAENZ, THE DIRECTOR OF CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; LARRY LEAMAN, THE DIRECTOR OF ORANGE COUNTY SOCIAL SERVICES AGENCY; MIKE MCMICHAEL, THE PROGRAM MANAGER; HELEN DWOJAK, THE SOCIAL SERVICES SUPERVISOR; AND MS. VREEKEN.

Q HAVE YOU EVER MET LARRY LEAMAN?

A I DON'T BELIEVE I HAVE. I DON'T RECALL.

Q BUT YOU CC'D A COPY OF THIS LETTER TO HIM, RIGHT?

A YES.

Q AND IT SAYS HERE THAT HE IS THE DIRECTOR OF ORANGE COUNTY SOCIAL SERVICES AGENCY.

DO YOU HAVE ANY UNDERSTANDING AS TO WHAT THE DIRECTOR OF THE AGENCY DOES?

[1534] A JUST A GENERAL UNDERSTANDING. HE OVERSEES ALL OPERATIONS OF THE AGENCY.

Q WHY WAS IT YOU SENT HIM THIS LETTER?

A WELL, BECAUSE WE WERE GETTING – TOWARDS THE END, WE WERE GETTING A CHANGE OF POSITION FROM THE DEPARTMENT OF SOCIAL SERVICES. YOU KNOW, ONE DAY THEY WANT TO SETTLE AND MOM IS OKAY, AND THEN THEY SHIFTED TO A DIRECTOR – OR A SUPERVISOR, MS. DWOJAK.

SO I FELT THAT I'M GOING TO HAVE TO GO ABOVE HER AND SEND IT TO THIS PERSON SO HOPEFULLY HE WILL MAYBE DO AN INTERNAL INVESTIGATION AND WE CAN COME TO SOME RESOLUTION.

Q OKAY. HOW ABOUT MIKE MCMICHAEL, PROGRAM MANAGER? DO YOU HAVE ANY UNDERSTANDING AS TO WHO HE WAS AT THE TIME, WHAT HE WAS SUPPOSED TO DO?

A AS I SIT HERE TODAY, I DON'T RECALL WHAT HIS SPECIFICS WERE. I JUST WENT

THROUGH THE PECKING ORDER OF THE PEOPLE THAT I THOUGHT SHOULD HAVE THIS INFORMATION SO THAT THIS LETTER DIDN'T SLIP THROUGH THE CRACKS AND IT WAS ON SOME DIRECTOR'S DESK AND NOT BE FILTERED DOWN TO THE RIGHT PEOPLE TO HANDLE THIS.

Q SO YOU JUST SORT OF SHOT-GUNNED IT OUT TO EVERYBODY IMAGINABLE?

A YES, WHO HAD SOME AUTHORITY TO DEAL WITH IT. YES.

* * *

[1535] Q DID YOU EVER GET ANY RESPONSE FROM ANYBODY AT SOCIAL SERVICES ABOUT WHAT WAS GOING ON HERE, WHAT YOU WERE COMPLAINING ABOUT?

A NO. NEVER DID.

Q DID AN INVESTIGATOR EVER CALL YOU UP AND TRY TO GET MORE DETAILS?

A NO.

[1536] Q NOBODY EVER SENT YOU A LETTER SAYING WE'RE INVESTIGATING THE MATTER, WE TAKE IT SERIOUSLY?

A NO.

Q AND I'M SORRY. DID YOU BRING IT WITH YOU HERE TODAY, TO COURT?

A YES, I DID.

* * *

THE NEXT QUESTION I'M GOING TO ASK YOU IS WHETHER THE LETTER THAT YOU HAVE THERE IN YOUR HAND IS A TRUE AND ACCURATE REFLECTION OF THE LETTER THAT YOU SENT TO COUNTY COUNSEL, RITA SAENZ, LARRY LEAMAN, MIKE MCMICHAEL, HELEN DWOJAK, AND MARCIE VREEKEN ON APRIL 14TH, 2000.

A YES, IT IS.

* * *

[1559] Q BY VIRTUE OF THIS MINUTE ORDER, WAS THE PETITION IN THE DEPENDENCY CASE DISMISSED?

A IT SAYS THAT THE SECOND AMENDED PETITION DATED FEBRUARY 23, AS TO COUNTS 12 AND 3, DISMISSED ON MOTION OF PETITIONER WITHOUT PREJUDICE, PURSUANT TO 301 AND FORMAL SUPERVISION.

* * *

[1610] (THE DEPOSITION TESTIMONY OF PATRICIA ANN DUMAS WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1612] "QUESTION: WHAT IS YOUR CURRENT JOB TITLE?

"ANSWER: SENIOR SOCIAL WORKER.

"QUESTION: FOR HOW LONG HAVE YOU HELD THAT JOB TITLE?

"ANSWER: NINE YEARS.

* * *

[1616] "QUESTION: AND I TAKE IT NO ONE THEN ATTEMPTED TO INVESTIGATE DEANNA'S ALLEGATION THAT MS. VREEKEN HAD LIED TO THE JUVENILE COURT, THAT YOU ARE AWARE OF?

[1617] "ANSWER: NO, NOT THAT I'M AWARE OF.

* * *

[1618] "QUESTION: THE NEXT DAY, MARCH 2ND, 2000, DID YOU ACCOMPANY MS. VREEKEN TO ORANGEWOOD CHILDREN'S HOME FOR AN INTERVIEW WITH THE CHILDREN?

"ANSWER: I DON'T REMEMBER THE DATE; BUT, YES, I DID ACCOMPANY MS. VREEKEN TO ORANGEWOOD TO INTERVIEW THE TWO CHILDREN. YES.

* * *

[1619] "ANSWER: WHAT I REMEMBER IS MARCIE ASKING THEM QUESTIONS I BELIEVE ABOUT THE ALLEGATIONS ALL OVER AGAIN. AND I THINK I ALSO REMEMBER HER ASKING THEM SPECIFICALLY ABOUT SOME INCIDENT

WITH DAD WHISPERING OR SOMETHING HAPPENING IN A MONITORED VISIT.

"QUESTION: AND THAT'S WHAT OCCURRED AT ORANGEWOOD?

"ANSWER: YES.

"QUESTION: AND YOU WERE PRESENT DURING THIS INTERVIEW?

"ANSWER: YES.

"QUESTION: WAS A PARENT PRESENT?

"ANSWER: NO.

"QUESTION: WAS EITHER PARENT GIVEN AN OPTION TO BE PRESENT?

"ANSWER: I DON'T THINK SO.

* * *

[1624] (THE DEPOSITION OF LAWRENCE LEAMAN WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

"QUESTION: SO YOU SERVED AS THE DIRECTOR OF THE ORANGE COUNTY SOCIAL SERVICE AGENCY FOR 20 YEARS?

[1625] "ANSWER: YES.

* * *

"QUESTION: SO YOU WERE THE PERSON WHO IS MOST RESPONSIBLE FOR ADMINISTERING, FOR EXAMPLE, THE CHILD WELFARE SERVICE PROGRAM; CORRECT?

"ANSWER: IN ORANGE COUNTY.

"QUESTION: IS THAT CORRECT?

"ANSWER: YES.

"QUESTION: AND YOU WERE THE PERSON WHO AT THE ORANGE COUNTY SOCIAL SERVICE AGENCY WAS RESPONSIBLE FOR [1626] MAKING SURE THAT THE POLICIES CONTAINED WITHIN THE RELEVANT PORTION OF THE WELFARE & INSTITUTIONS CODE AND OTHER LAWS APPLICABLE TO CHILD WELFARE SERVICES WERE IMPLEMENTED AND CARRIED OUT IN THE COUNTY?

"ANSWER: TO THE EXTENT I HAD JURISDICTION, YES.

"QUESTION: AND YOU WERE IN FACT THE DIRECTOR OF THE SOCIAL SERVICE AGENCY AS OF FEBRUARY 17, 2000; CORRECT?

"ANSWER: YES.

* * *

[1627] "QUESTION: WHAT RESPONSIBILITY DID YOU HAVE AS OF FEBRUARY 2000 TO ASSURE THAT ADEQUATE TRAINING WAS PROVIDED TO SOCIAL WORKERS IN THE CHILD

WELFARE SERVICES DIVISION OF THE SOCIAL SERVICE AGENCY?

"ANSWER: OVERSIGHT RESPONSIBILITY.

* * *

[1628] "QUESTION: DID YOU EVER BACK IN 2000 OR THEREABOUTS CONSIDER THE ISSUE OF A PARENT'S RIGHTS IN ONE OF THESE PROCEEDINGS TO BE A HOT BUTTON ISSUE, AS YOU'VE DEFINED THE TERM?

"ANSWER: YES, AT TIMES.

* * *

[1630] "QUESTION: WELL, AT THE TIME THAT YOU WERE THE DIRECTOR, WAS IT YOUR POLICY TO DISCLOSE TO THE OPPOSING PARTY, THE PARENT, EXCULPATORY EVIDENCE THAT YOUR DEPARTMENT OBTAINED DURING ITS INVESTIGATIONS.

"ANSWER: I AM, AS YOU MAY KNOW, NOT AN ATTORNEY. AND I'M NOT EVEN SURE WHAT THE DEFINITION OF EXCULPATORY EVIDENCE IS.

"QUESTION: LET ME ASK IT THIS WAY: IN THE EVENT THAT ONE OF YOUR SOCIAL WORKERS DISCOVERED SOME FACT THAT WOULD DEMONSTRATE THE INCORRECTNESS OF THE ALLEGATIONS, WOULD THAT BE SOMETHING THAT YOU WOULD HAVE A POLICY

WHICH WOULD MANDATE THE DISCLOSURE OF THAT FACT?

"ANSWER: I'M NOT AWARE OF A POLICY, PER SE, BUT IT WOULD BE MY EXPECTATION. IT WE'RE TALKING ABOUT A PRESENTATION TO THE COURT, THAT ALL [1631] DYNAMICS OF THE CASE BE PRESENTED, INCLUDING ANY INFORMATION THAT YOU DESCRIBED, SUCH AS YOU DESCRIBED.

* * *

"QUESTION: IS IT YOUR UNDERSTANDING YOUR DEPARTMENT HAD A DUTY AND THE SOCIAL WORKERS IN YOUR DEPARTMENT HAD A DUTY TO DISCLOSE FACTS THAT WOULD DEMONSTRATE THE INNOCENCE OF A PARENT IN A PARTICULAR CASE?

"ANSWER: HANGING MY HAT ON THE WORD "FACTS," YES.

* * *

"QUESTION: DID YOU HAVE A POLICY TO THAT EFFECT?

[1631] "ANSWER: I DID NOT HAVE A WRITTEN POLICY TO THAT EFFECT, BUT IT WAS MY EXPECTATION.

"QUESTION: SO YOU'VE NEVER DIRECTED THAT DR. REILY PROMULGATE ANY WRITTEN POLICY TO THAT EFFECT, CORRECT?

"ANSWER: I DON'T REMEMBER DOING SO, NO."

* * *

[1633] (THE DEPOSITION TESTIMONY OF SUSAN HOLL WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

"QUESTION: YOU UNDERSTAND YOU'RE UNDER OATH?

"ANSWER: YES.

* * *

[1635] "QUESTION: WHAT DO YOU DO?

"ANSWER: I MANAGE A PROGRAM OF APPROXIMATELY 75 PEOPLE. UNDER ME ARE THE DEPENDENCY INVESTIGATION UNITS, COURT OFFICER UNITS, SEARCH UNIT, AND INDIAN CHILD WELFARE ACT UNIT. I OVERSEE THE INTERSTATE COMPACT FOR PLACEMENT OF CHILDREN UNIT. THOSE ARE ACTUALLY INDIVIDUALS, NOT FULL UNITS. AND I THINK THAT'S – I THINK THAT'S IT. INTERCOUNTY TRANSFER ALSO.

* * *

[1636] "QUESTION: IS THERE A WRITTEN POLICY OR PROCEDURE OR ANY OTHER DOCUMENT NOT NECESSARILY BEARING THE TITLE POLICY OR PROCEDURE, BUT ANY

DOCUMENT THAT INSTRUCTS THE SUPERVISOR AS TO WHAT IT IS THEY'RE LOOKING FOR WHEN THEY REVIEW ONE OF THESE REPORTS PRIOR TO THE TIME IT'S SUBMITTED TO THE COURT?

"ANSWER: NOT SPECIFICALLY FOR THE SUPERVISOR.

* * *

[1653] "QUESTION: DID YOU UNDERTAKE ANY EFFORT TO LOOK FOR ANY DOCUMENTS, POLICIES, OR PROCEDURES RELATING TO ORANGE COUNTY SOCIAL SERVICES'S PROMULGATION – OR I'M SORRY. – ANY DOCUMENTS RELATING TO ORANGE COUNTY SOCIAL SERVICES'S PROMULGATION OF ANY PRACTICES OR POLICIES OR PROCEDURES RELATING TO A PARENT'S CIVIL RIGHTS?

"ANSWER: I PRINTED OUT CLIENT – THE CLIENT RIGHTS.

"QUESTION: OKAY. THAT'S –

"ANSWER: TWO OF THEM. ONE OF THEM IS FROM 2001, AND THE OTHER ONE WAS – JUST CAME OUT WITHIN THE LAST MONTH. ACTUALLY, ABOUT THE LAST TWO WEEKS. AND THAT'S THE REVISION DATED AUGUST 29TH, 2006.

"QUESTION: OKAY. AND NEITHER OF THESE, THOUGH, WERE IN EXISTENCE PRIOR TO JULY 26, 2001; CORRECT?

"ANSWER: CORRECT.

"QUESTION: DO YOU KNOW WHY THESE WERE PROMULGATED?

"ANSWER: TO PROVIDE GUIDELINES [1654] FOR ASSURING THE RIGHTS OF C.F.S. CLIENTS AS MANDATED BY STATE AND FEDERAL CIVIL RIGHTS LAWS AND REGULATIONS.

"QUESTION: OKAY. AND BY "CLIENTS" WE'RE TALKING ABOUT THE PARENTS' RIGHTS?

"ANSWER: YES. YES.

* * *

"QUESTION: SO WHAT ARE THE CONSEQUENCES FOR NOT PROVIDING ACCURATE AND COMPLETE AND OBJECTIVE REPORTS TO THE COURT?

"ANSWER: WELL, THAT'S A VERY GENERAL STATEMENT OR A VERY GENERAL QUESTION. I MEAN, IF SOMEONE WERE TO, [1655] YOU KNOW, TO KNOWINGLY FABRICATE SOMETHING OR LIE ABOUT SOMETHING, THAT COULD BE GROUNDS FOR – I MEAN, IF THEY'RE – IT SAYS IN HERE, UNDER MALICE – JUST A SECOND.

"QUESTION: WHICH ONE ARE YOU LOOKING AT?

"ANSWER: JUST A SECOND. LET ME FIND IT:

"OKAY. HERE WE GO. I'M SORRY. IT'S CLIENT RIGHTS, AND IT'S NUMBER A-0309, APPROVED JULY 26, 2001.

"ON PAGE TWO IT TALKS ABOUT LAWFUL CONDUCT BY STAFF AND CIVIL LIABILITY, AND IT DEFINES MALICE AS CONDUCT THAT IS INTENDED BY THE SOCIAL WORKER TO CAUSE INJURY TO THE PLAINTIFF OR DESPICABLE CONDUCT THAT IS CARRIED ON WITH A WILLFUL AND CONSCIOUS DISREGARD OF THE RIGHTS OR SAFETY OF OTHERS, WHICH INCLUDE PERJURY, FABRICATION OF EVIDENCE, FAILURE TO DISCLOSE KNOWN EXCULPATORY EVIDENCE, OBTAINING TESTIMONY BY DURESS, FRAUD, OR UNDUE INFLUENCE.

"AND THEN IT GOES ON TO SAY THAT [1656] IMMUNITY OF SOCIAL WORKERS FROM CIVIL LIABILITY IS NOT ABSOLUTE AND INJURY RESULTING FROM ACTS OF OMISSIONS MADE WHILE – LET ME SEE. I'M SORRY. THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL SERVICE WORKERS – I'M SORRY.

"THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL WORKERS DOES NOT EXTEND TO MALICIOUS ACTS AS DEFINED ABOVE.

"SO, CONSEQUENTLY, IT IS ESSENTIAL THAT ALL STAFF UNDERSTAND THEY MAY BE HELD PERSONALLY AND FINANCIALLY LIABLE FOR SUCH ACTS.

"QUESTION: OKAY. TO YOUR KNOWLEDGE, HAS THE AGENCY EVER DISCIPLINED A WORKER FOR MAKING AN INACCURATE STATEMENT IN A REPORT?

"ANSWER: AN INACCURATE STATEMENT?

"QUESTION: CORRECT. RIGHT.

"ANSWER: NO.

"QUESTION: AND THAT'S IN YOUR ENTIRE 20 YEARS AT THE AGENCY?

"ANSWER: YOU'RE ASKING – YOU [1657] ARE ONLY ASKING ABOUT INACCURATE STATEMENTS?

"QUESTION: CORRECT.

"ANSWER: NO.

"QUESTION: TO YOUR KNOWLEDGE, IN YOUR 20 YEARS AT THE AGENCY – ACTUALLY, MORE THAN 20 YEARS AT THE AGENCY – HAS ANY SOCIAL WORKER THAT YOU KNOW OF EVER BEEN DISCIPLINED FOR SUPPRESSING EXCULPATORY EVIDENCE?

"ANSWER: NOT TO MY KNOWLEDGE.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY – AND IT IS 22 YEARS, RIGHT?

"ANSWER: YES.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY, HAS ANY SOCIAL WORKER OR SOCIAL WORKER'S SUPERVISOR, FOR THAT MATTER, BEEN DISCIPLINED FOR MAKING AN UNTRUTHFUL STATEMENT IN A REPORT?

"ANSWER: NOT TO MY KNOWLEDGE, NO.

[1658] "IN YOUR 22 YEARS OF EXPERIENCE AT THE AGENCY, HAS ANY SUPERVISOR OR SOCIAL WORKER EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR PRESENTING UNFOUNDED EVIDENCE OR MAKING UNFOUNDED ACCUSATIONS?

[1659] "ANSWER: NO.

* * *

"QUESTION: AND YOU REMEMBER WE TALKED ABOUT THIS SOMEWHAT AT LENGTH THAT YOU WERE DESIGNATED AS THE PERSON MOST KNOWLEDGEABLE – OR, RATHER, MOST QUALIFIED TO TESTIFY ON BEHALF OF ORANGE COUNTY SOCIAL SERVICES REGARDING THE POLICIES AND PROCEDURES AS APPLIED IN THE CASE INVOLVING DEANNA FOGARTY-HARDWICK; CORRECT?

"ANSWER: YES."

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
	)	
VS.	)	
COUNTY OF ORANGE,	)	NO. 01CCO2379
MARCIE VREEKEN,	)	
ELAINE WILKINS, AND	)	
HELEN DWOJAK,	)	
	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 14, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[2347] MARCIE VREEKEN,

CALLED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANTS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[2489] Q I WOULD LIKE YOU TO TURN TO – ACTUALLY, LET ME ASK YOU THIS QUESTION FIRST: YOU TESTIFIED EARLIER ON YOUR DIRECT EXAMINATION ABOUT HOW YOU WERE PLAYING PHONE TAG WITH DR. MITCHELL AND WERE NEVER ACTUALLY ABLE TO GET AHOLD OF HER.

DO YOU REMEMBER THAT TESTIMONY?

A NO. I TESTIFIED THAT I HAD TALKED TO HER ON A [2490] FEW OCCASIONS.

* * *

[2492] Q SO WERE YOU ON THE STAND?

A YES. ON FRIDAY, MARCH 31ST, YES, I WAS.

Q IN FACT, YOU WERE ON – YOU WERE THE ONLY WITNESS ON THE STAND THAT DAY, RIGHT?

* * *

BY MR. MCMILLAN:

* * *

[2493] A YES.

Q AND THAT'S WHEN THE THE COURT ACTUALLY ASKED YOU WHETHER OR NOT YOU HAD – LET ME SEE HERE.

LOOK AT PAGE 202, LINE SEVEN, WHERE IT SAYS –

* * *

Q WHERE IT SAYS:

> "I HATE TO SAY THAT I ASSUME THAT IF THERE IS A PROBLEM, THAT THEY WOULD BRING THAT UP AND THAT THE AGENCY WOULD HAVE DONE SO.
>
> "MA'AM, IF YOU HAD THAT KIND OF SITUATION, YOU WOULD BRING IT TO THE COURT'S ATTENTION?"

AND WHERE IT SAYS "THE WITNESS," THAT'S YOU; RIGHT?

A YES.

Q SAYING "YES"?

A YES.

* * *

[2494] Q OKAY. AND THEN IT SAYS AGAIN:

"THE COURT: AND IN NOT BRINGING IT TO THE ATTENTION OF THE COURT AT THIS TIME, DOES THAT MEAN THAT AT THIS TIME YOU DON'T FEEL THAT YOU HAVE A SITUATION WHERE WE NEED TO ACT ON SOMETHING RIGHT THIS MINUTE?"

AND THEN, AGAIN, THE WITNESS ANSWERS: "YES."

* * *

BY MR. MCMILLAN:

Q RIGHT?

A CORRECT.

Q AND THE WITNESS WAS YOU?

A YES.

Q AND YOU GUYS WERE TALKING ABOUT THE MARJORIE MITCHELL LETTER THAT YOU TESTIFIED EARLIER CAME IN DURING THE RECESS THAT WE TALKED ABOUT ON PAGE 200, LINE 14?

* * *

THE WITNESS: YES. WE WERE TALKING ABOUT THAT LETTER, YES.

BY MR. MCMILLAN:

* * *

[2500] Q PRIOR TO THE TIME THAT YOU TOOK THE STAND ON MARCH 31ST, YOU HAD KNOWLEDGE, DIDN'T YOU, OF THE CHILDREN'S EMOTIONAL STATE?

* * *

THE WITNESS: YES, I HAD KNOWLEDGE OF THEIR EMOTIONAL STATE.

* * *

[2506] Q * * *

DID YOU MAKE THE COURT AWARE ON MARCH 31ST THAT YOU HAD RECEIVED A PHONE CALL, A PHONE MESSAGE, FROM DR. MITCHELL, SAYING THAT KENDALL SEEMS TO BE SHUTTING DOWN?

* * *

THE WITNESS: I DON'T RECALL. I DON'T THINK SO.

* * *

[2521] Q NOW, AT ANY POINT DID ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY CONSIDER OR DISCUSS WITH YOU THE IDEA OF REMOVING YOU AS THE SENIOR SOCIAL WORKER AFTER THE INCIDENT ON THE 15TH?

* * *

THE WITNESS: NO.

BY MR. MCMILLAN:

* * *

MR. MCMILLAN: YOUR HONOR, I WOULD READ FROM PAGE 78, LINE 18, THROUGH 80, LINE SEVEN.

[2522] THE COURT: PAGE 78, LINE 18, THROUGH PAGE 80, LINE SEVEN.

MR. MCMILLAN: 78, 18. YES, YOUR HONOR.

THE COURT: YES, PLEASE.

MR. MCMILLAN:

"QUESTION: DID ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY CONSIDER OR DISCUSS THE IDEA OF REMOVING YOU AS THE SENIOR SOCIAL WORKER AFTER MS. FOGARTY COMPLAINED THAT YOU'D LIED TO THE COURT?

"ANSWER: I DON'T RECALL.

"QUESTION: NOT THAT YOU'RE AWARE OF, RIGHT?

"ANSWER: NO. OH, CAN I INTERJECT SOMETHING?

"QUESTION: YES.

"ANSWER: IT HAPPENS ON SO MANY CASES WHERE THE PARENT IS

UNHAPPY WITH THE SOCIAL WORKER AND THEY WANT TO SWITCH; AND GENERALLY WE DON'T DO THAT BECAUSE IT'S MUCH BETTER FOR ONE SOCIAL WORKER WHO KNOWS THE STORY, WHO HAS MADE THE INTERVIEWS, TO KEEP THE CASE.

* * *

[2523] MR. MCMILLIAN:

"QUESTION: IN THESE SO MANY CASES THAT YOU TOLD ME ABOUT JUST A MOMENT AGO, IN HOW MANY OF THOSE CASES WERE THE PARENTS COMPLAINING THAT A SOCIAL WORKER HAS PERJURED HIM OR HERSELF THAT YOU'RE AWARE OF?

"ANSWER: FIFTY PERCENT OF THE CASES.

* * *

[2580] Q NOW, AFTER THIS INCIDENT ON FEBRUARY 15TH, DID YOU EVER HAVE A DISCUSSION WITH KENDALL – WITH THE CHILDREN TO DETERMINE WHAT THEY HEARD THEIR MOTHER SAY THAT EVENING, IF ANYTHING?

A YES.

Q AND LET'S START WITH KENDALL.

WHEN YOU SPOKE WITH KENDALL ABOUT THAT EVENING OF FEBRUARY 15TH, DID SHE

INDICATE TO YOU ONE WAY OR ANOTHER WHETHER OR NOT SHE HEARD HER MOTHER SAY WHAT ELAINE WILKINS SAYS SHE SAID ABOUT CARY HARDWICK –

* * *

[2581] THE WITNESS: YES.

BY MR. MCMILLAN:

Q LET ME FINISH THE QUESTION.

– ABOUT CARY HARDWICK TRYING TO TAKE THE CHILDREN AWAY FROM DEANNA FOGARTY AND PUT THEM IN A FOSTER HOME?

A YES.

Q AND DID KENDALL TELL YOU THAT SHE DID NOT HEAR HER MOTHER SAY THAT AT ALL THAT NIGHT?

* * *

THE WITNESS: KENDALL SAID THAT HER DAD SAID THAT, NOT HER MOTHER.

MR. MCMILLAN: YOUR HONOR, I WOULD READ FROM PAGE 167, OF EXHIBIT 133, OF THE TRIAL TESTIMONY OF MARCIE VREEKEN, TAKEN ON MARCH 31ST, 2000. PAGE 167, LINES 21, ALL THE WAY THROUGH 168, LINE 14.

* * *

[2582] "QUESTION: AND LET'S START WITH KENDALL.

* * *

"WHEN YOU SPOKE WITH KENDALL ABOUT THAT EVENING OF FEBRUARY 15, DID SHE INDICATE TO YOU ONE WAY OR THE OTHER WHETHER OR NOT SHE HEARD HER MOTHER SAY WHAT ELAINE SAYS SHE SAID ABOUT HER FATHER TRYING TO TAKE THEM AWAY FROM HER AND PUT THE CHILDREN IN A FOSTER HOME?

"ANSWER: SHE SAID HER MOTHER DIDN'T SAY ANYTHING BAD.

"QUESTION: DID SHE SAY IN A – DID KENDALL SAY SHE DID NOT HEAR SUCH A STATEMENT COMING FROM HER MOTHER THAT EVENING?

"ANSWER: YES.

"QUESTION: AND DID YOU TALK TO PRESLIE ABOUT WHETHER OR NOT SHE HEARD HER MOTHER THAT EVENING, THE 15TH, SAY WHAT ELAINE WILKINS SAID SHE SAID ABOUT ACCUSING THE FATHER OF TAKING THE CHILDREN AWAY FROM HER AND PUTTING THEM IN A FOSTER HOME?

"ANSWER: YES.

"QUESTION: WHAT DID PRESLIE SAY [2583] THAT SHE HEARD, IF ANYTHING?"

* * *

"ANSWER: CAN I REFER TO MY NOTES?

"SHE ALSO DENIED HEARING ANYTHING. I DON'T KNOW EXACTLY WHAT SHE SAID."

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 20, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[2694] AS YOU WELL APPRECIATE, LADIES AND GENTLEMEN, YOU HAVE NOW HEARD ALL THE EVIDENCE THAT YOU WILL HEAR IN THIS CASE. THE ATTORNEYS WILL, AS I HAVE MENTIONED, HAVE ONE LAST CHANCE TO TALK TO YOU IN CLOSING ARGUMENT; BUT BEFORE THEY DO, IT IS MY DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE. YOU MUST FOLLOW THESE INSTRUCTIONS, AS WELL AS THOSE I HAVE PREVIOUSLY GIVEN YOU.

* * *

[2704] A PARTY MUST PERSUADE YOU, LADIES AND GENTLEMEN, BY THE EVIDENCE PRESENTED IN COURT THAT WHAT HE OR SHE IS REQUIRED TO PROVE IS MORE LIKELY TO BE TRUE THAN NOT TRUE. THIS IS REFERRED TO AS THE BURDEN OF PROOF. AFTER WEIGHING ALL OF THE EVIDENCE, IF YOU CANNOT DECIDE THAT SOMETHING IS MORE LIKELY TO BE TRUE THAN NOT TRUE, YOU MUST CONCLUDE THAT THE PARTY DID NOT PROVE IT.

* * *

[2706] NOW, LADIES AND GENTLEMEN, I AM COMING INTO THE PART OF THAT SECOND SET OF THE INSTRUCTIONS OR THAT SECOND PORTION OF THE INSTRUCTIONS WHERE I'LL BE GIVING YOU THE RULES THAT GOVERN THE

PARTICULAR CLAIMS PRESENTED IN THIS CASE.

THE PLAINTIFF, MS. FOGARTY-HARDWICK, CLAIMS THAT DEFENDANT[S] MARCIE VREEKEN AND ELAINE WILKINS AND HELEN DWOJAK VIOLATED HER CIVIL RIGHTS. TO ESTABLISH THIS CLAIM, THE PLAINTIFF MUST PROVE ALL OF THE FOLLOWING:

ONE, THAT MS. VREEKEN OR MS. WILKINS OR MS. DWOJAK INTENTIONALLY, BY HER WORDS OR CONDUCT, REMOVED AND/OR CAUSED THE REMOVAL AND/OR DETENTION OF PLAINTIFF'S CHILDREN FROM PLAINTIFF'S CUSTODY OR [2707] OTHERWISE INTERFERED WITH HER RIGHTS AS A PARENTS [sic];

TWO, THAT SUCH DEFENDANT WAS ACTING OR PURPORTING TO ACT IN THE PERFORMANCE OF HER OFFICIAL DUTIES;

THREE, THAT DEFENDANT'S CONDUCT VIOLATED THE PLAINTIFF'S RIGHT OF FAMILIAL ASSOCIATION, INCLUDING HER RIGHT TO THE CARE AND CUSTODY OF HER TWO MINOR CHILDREN, KENDALL AND PRESLIE HARDWICK, OR VIOLATED THE PLAINTIFF'S RIGHT OF PRIVACY;

NUMBER FOUR, THAT MS. FOGARTY-HARDWICK WAS HARMED;

AND, NUMBER FIVE, THAT DEFENDANTS' CONDUCT WAS A SUBSTANTIAL FACTOR IN THE PLAINTIFF'S HARM.

PLAINTIFF FOGARTY-HARDWICK ALSO CLAIMS SHE WAS DEPRIVED OF HER CIVIL RIGHTS AS A RESULT OF OFFICIAL POLICIES AND/OR CUSTOMS OF THE SOCIAL SERVICES DIVISION OF THE COUNTY OF ORANGE.

TO ESTABLISH THIS CLAIM, PLAINTIFF MUST PROVE ALL OF THE FOLLOWING:

NUMBER ONE, THAT EITHER MS. VREEKEN OR MS. WILKINS OR MS. DWOJAK INTENTIONALLY, BY WORDS OR CONDUCT, REMOVED OR CAUSED THE REMOVAL AND/OR DETENTION OF PLAINTIFF'S CHILDREN FROM PLAINTIFF'S CUSTODY OR OTHERWISE INTERFERED WITH HER RIGHTS AS A PARENT;

TWO, THAT THE CONDUCT OF AT LEAST ONE OF THOSE DEFENDANTS OCCURRED AS A RESULT OF AN OFFICIAL POLICY OR [2708] CUSTOM OF THE COUNTY OF ORANGE SOCIAL SERVICES AGENCY;

THREE, THAT THE PLAINTIFF WAS HARMED;

AND, FOUR, THAT EITHER MS. VREEKEN, MS. WILKINS, OR MS. DWOJAK'S CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S HARM.

A TERM I USED WAS "OFFICIAL POLICY" OR "CUSTOM." THAT MEANS A CUSTOM THAT IS A PERMANENT WIDESPREAD OR WELL SETTLED PRACTICE OF THE COUNTY, OR ANY ACT OR OMISSION APPROVED BY THE COUNTY'S LAW MAKING OFFICER OR POLICY-MAKING OFFICIAL.

MS. FOGARTY-HARDWICK CLAIMS THAT SHE WAS DEPRIVED OF HER CIVIL RIGHTS AS A RESULT OF THE ORANGE COUNTY SOCIAL SERVICES AGENCY'S FAILURE TO TRAIN AND/OR SUPERVISE ITS EMPLOYEES.

TO ESTABLISH THIS CLAIM, PLAINTIFF MUST PROVE ALL OF THE FOLLOWING:

NUMBER ONE, THAT THE ORANGE COUNTY SOCIAL SERVICES AGENCY'S TRAINING PROGRAM WAS NOT ADEQUATE TO TRAIN ITS EMPLOYEES PROPERLY TO HANDLE USUAL AND RECURRING SITUATIONS AND/OR ITS SOCIAL WORKERS WERE NOT ADEQUATELY SUPERVISED IN THEIR HANDLING OF USUAL AND RECURRING SITUATIONS;

NUMBER TWO, THAT THE ORANGE COUNTY SOCIAL SERVICES AGENCY WAS DELIBERATELY INDIFFERENT TO THE NEED TO TRAIN AND/OR SUPERVISE ITS EMPLOYEES ADEQUATELY;

NUMBER THREE, THAT THE FAILURE TO PROVIDE [2709] PROPER TRAINING AND/OR SUPERVISION WAS THE CAUSE OF THE

DEPRAVATION OF MS. FOGARTY-HARDWICK'S RIGHT TO THE CARE AND CUSTODY OF AND ASSOCIATION WITH HER CHILDREN OR HER RIGHT OF PRIVACY. THAT IS TO SAY, THAT THIS ACTION DEPRIVED HER OF HER RIGHT OF FAMILIAL ASSOCIATION WITH HER CHILDREN OR OF HER RIGHT OF PRIVACY;

NUMBER FOUR, THAT MS. FOGARTY-HARDWICK WAS HARMED;

AND, NUMBER FIVE, THAT ORANGE COUNTY SOCIAL SERVICES AGENCY'S FAILURE ADEQUATELY TO TRAIN AND/OR SUPERVISE ITS EMPLOYEES WAS A SUBSTANTIAL FACTOR IN CAUSING THE PLAINTIFF'S HARM.

A COUPLE MORE DEFINITIONS FOR YOU LADIES AND GENTLEMEN.

DELIBERATE INDIFFERENCE IS THE KNOWING OR RECKLESS DISREGARD OF THE CONSEQUENCES OF ONE'S ACTS OR OMISSIONS. TO ESTABLISH DELIBERATE INDIFFERENCE, MS. FOGARTY-HARDWICK MUST PROVE THAT ORANGE COUNTY SOCIAL SERVICES AGENCY KNEW OR SHOULD HAVE KNOWN THAT ITS FAILURE TO PROVIDE REASONABLE TRAINING AND/OR SUPERVISION WOULD LIKELY RESULT IN A VIOLATION OF THE RIGHT TO FAMILIAL ASSOCIATION OR THE RIGHT TO PRIVACY OF MS. FOGARTY-HARDWICK.

I USED THE TERM "SUBSTANTIAL FACTOR" IN SEVERAL OF THE RULES THAT I'VE GIVEN YOU THUS FAR. A SUBSTANTIAL FACTOR IN CAUSING HARM IS A FACTOR THAT A REASONABLE [2710] PERSON WOULD CONSIDER TO HAVE CONTRIBUTED TO THE HARM. IT MUST BE MORE THAN A REMOTE OR TRIVIAL FACTOR. IT DOES NOT HAVE TO BE THE ONLY CAUSE OF THE HARM.

IF YOU DECIDE THAT MS. FOGARTY-HARDWICK HAS PROVED ANY OF HER CLAIMS AGAINST DEFENDANTS, YOU MUST ALSO DECIDE HOW MUCH MONEY WILL REASONABLY COMPENSATE THE PLAINTIFF FOR THAT HARM. THIS COMPENSATION IS CALLED DAMAGES.

* * *

[2712] NOW, THE ARGUMENTS OF THE ATTORNEYS ARE NOT EVIDENCE OF ANYTHING AND THEY'RE CERTAINLY NOT EVIDENCE OF DAMAGES. YOUR AWARD MUST BE BASED ON YOUR REASONED JUDGMENT, APPLIED TO THE TESTIMONY OF THE WITNESSES AND THE OTHER EVIDENCE THAT HAS BEEN ADMITTED DURING TRIAL.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	NO. 01CCO2379
COUNTY OF ORANGE, ET AL.,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 21, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[2776] A PERSON'S CONDUCT, LADIES AND GENTLEMEN, MAY COMBINE WITH ANOTHER FACTOR TO CAUSE HARM. IF YOU FIND THAT DEFENDANTS' CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S HARM, THEN DEFENDANT IS RESPONSIBLE FOR THE HARM AND DEFENDANT CANNOT AVOID RESPONSIBILITY JUST BECAUSE OTHER PERSONS OR CONDITIONS OR EVENTS WAS ALSO A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S HARM.

* * *

[2779] COUNSEL WILL GIVE YOU SUGGESTIONS. IF THEY DISAGREE OR IF THEY ARE DISCORDANT WITH YOUR RECOLLECTION, YOUR RECOLLECTION OF COURSE CONTROLS. YOU MAKE THOSE DECISIONS. AND YOU HAVE THAT RESOURCE AVAILABLE TO YOU IF YOU WISH TO CALL UPON THE COURT REPORTER.

* * *

[2835] MR. STEBENS, PLEASE.

MR. STEBENS: THANK YOU.

* * *

[2849] THE SECOND IS, WERE THEY ACTING IN AN OFFICIAL CAPACITY. AND, AGAIN, AS MR. MCMILLAN SAID, WE'VE ADMITTED THAT AT ALL TIMES THAT THE SOCIAL WORKERS WERE ACTING – IN THIS CASE WERE ACTING AS EMPLOYEES OF THE COUNTY OF ORANGE.

* * *

[2853] NOW, GOING BACK TO FEBRUARY 15, 2000, ITSELF, CERTAINLY, AS MR. MCMILLAN INDICATED, WE'RE TALKING ABOUT A CREDIBILITY ISSUE. DO YOU BELIEVE WHAT THE MOTHER HAD TO SAY? DO YOU BELIEVE WHAT THE SOCIAL WORKERS HAD TO SAY ABOUT WHO MADE THIS STATEMENT?

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	NO. 01CCO2379
COUNTY OF ORANGE, ET AL.,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MAY 14, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF: SHAWN A. MCMILLAN
ATTORNEY AT LAW

FOR DEFENDANTS: BEAM, BROBECK & WEST
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[3004] SANTA ANA, CALIFORNIA –
MONDAY, MAY 14, 2007

AFTERNOON SESSION

* * *

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

* * *

THE COURT: OUR TOPIC THIS AFTERNOON IS THE REQUEST FOR INJUNCTIVE RELIEF.

* * *

[3016] THE COURT: IN THE COURSE OF ALL THE TESTIMONY WE HEARD, I SUPPOSE DIFFERENT SNIPPETS OF TESTIMONY AFFECT DIFFERENT PEOPLE IN DIFFERENT WAYS.

BUT THE COURT WAS MOST TAKEN ABACK BY THE TESTIMONY THAT IT IS THE STANDARD OPERATING PROCEDURE OF THE COUNTY OF ORANGE SOCIAL SERVICES AGENCY TO MAKE A CHARGING ALLEGATION AGAINST BOTH PARENTS WHENEVER A CLAIM IS INITIATED AGAINST ONE. THAT IS TO SAY, IT IS STANDARD OPERATING PROCEDURE TO ALLEGE A FAILURE TO PROTECT [3017] WITHOUT ANY FURTHER INFORMATION, OTHER THAN THE FACT THAT THERE MAY BE EVIDENCE THAT ONE PARENT HAS BEEN NEGLECTFUL OR HARMFUL.

AND I'VE BEEN TRYING TO THINK WHY THAT EVIDENCE, THAT BIT OF TESTIMONY, AMONG ALL THE THINGS THAT OCCURRED IN THIS TRIAL, WAS MOST NOTEWORTHY TO THE COURT. AND I DON'T HAVE A GOOD ANSWER

EXCEPT THAT THE COURT IS TRAINED TO THINK IN TERMS OF PROPER PLEADINGS, SUFFICIENT JUSTIFICATION, THE RULES OF ETHICS WHICH ARE IMPOSED UPON LAWYERS REQUIRING THAT CHARGING ALLEGATIONS BE BASED UPON SOME DEFINABLE REASON TO BELIEVE THAT THERE IS CAUSE FOR SUCH A CLAIM.

IT MAY BE THAT NOT COMING TO THIS COURT AS A MOTHER, NOT COMING TO THIS COURT FOR SOME TIME AS A CHILD, NOT REALLY COMING TO THIS COURT FOR SOME TIME AS A PARENT OF A CHILD THAT MIGHT BE WITHIN THE CONTROL OF THE COURT – IT WAS THAT BIT OF EVIDENCE THAT STRUCK THE COURT, WHICH HAS AT THIS POINT ITS PRINCIPAL LIFE EXPERIENCE AS AN ARBITER OF PLEADINGS AND LEGAL ISSUES. THAT WAS THE EVIDENCE THAT STRUCK ME AS REALLY DISCORDANT. AND AT THE TIME I HEARD IT, I WAS TROUBLED.

I GIVE CREDIT TO THE PLAINTIFF FOR DEFINING THE PROPOSED INJUNCTION IN TERMS OF THAT REGULAR ACKNOWLEDGED PRACTICE OF THE SOCIAL SERVICES AGENCY.

I DON'T THINK THERE IS ANY OF US THAT COULD SAY THAT THAT IS CORRECT, TO MAKE SUCH A CHARGING ALLEGATION [3018] WITH NO SUPPORTING EVIDENCE. AND THE COUNTY ACKNOWLEDGES THAT IT DOES SO.

SHOULD WE ENTER AN ORDER TO THAT EFFECT? YES, WE SHOULD. THAT PRACTICE SHOULD BE TERMINATED.

* * *

EXHIBIT NO. 39

* * *

FEB ~~27~~ 2007 FEB 14 2007

☒ IN EVIDENCE (Date) FEB 27 2007

* * *

MARJORIE CAIN MITCHELL, PH.D.
PSYCHOLOGY CORPORATION
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(562) 454-5726
FACSIMILE NO.
(562) 985-1377

CALIFORNIA LICENSES
PSY 7257 & MPT 8645

March 31, 2000 SENT BY FACSIMILE & US MAIL

To: Marcy Vreeken, CSW
Department of Children & Family Services

Re: Matter of Hardwick

Dear Ms. Vreeken,

This progress report on the psychotherapy of Kendall and Preslie Hardwick is a follow up to the telephone message that I left earlier today. During the time that Kendall and Preslie were placed in Orangewood I had the opportunity to visit them on two separate occasions for over an hour each time. I also was able to speak to Kendall over the telephone several times

during the same period. During this time I found Preslie to be angrily acting out. Her older sister, Kendall, was often tearful throughout the visit and would cling to this psychologist prior to leaving.

In addition, I had the opportunity to evaluate both girls yesterday after their foster mother, Sheryl Gibson, drove them to my office for the one hour session. Yesterday I found Preslie to be greatly relieved that she was out of Orangewood although very sad to be in a foster home, even though Ms. Gibson has been excellent with them.

Of greatest concern was Kendall who shows signs of emotional regression. She was tearful throughout the session, begging to go home. Her affect was flattened which is a sign of emotional blunting. Kendall appears terrified in a new school and pleaded to return to her mother's home. She cannot concentrate at school, as she thinks nonstop of being back with mother and Rosie, her nanny. Throughout the session Kendall showed signs of extreme emotional lability, often breaking into tears. She doesn't know how much longer she can cope and visibly shook while relating this to this psychologist.

This child had been diagnosed as being mildly autistic. These children have great difficulty with changes and transitions. They are prone to extreme anxiety when their structured life has been interrupted. Kendall was terrified of noises from other offices and seemed on edge as though [sic] anticipating the unexpected.

As their psychologist I am very worried about the girls, particularly Kendall. She appears to be highly stressed and not handling the prolonged placement. It is clinically a concern that Kendall appears to be withdrawing into herself which is not in her best interest as an autistic child. This child is in immediate need of stability and structure in her life. The separation from her caretakers has been highly traumatic for her and I am concerned that a prolonged placement will further deteriorate her level of functioning. I strongly encourage and request that the matter of the children's placement be reviewed with careful attention given to the regression in Kendall's socioemotional functioning.

Thank you for your attention to this concern.

Respectfully yours,

/s/ Marjorie Cain Mitchell, Ph.D.
Marjorie Cain Mitchell, Ph.D.
Clinical and Forensic Psychologist

EXHIBIT NO. 164

* * *

☒ IN EVIDENCE (Date) MAR 06 2007

* * *

April 8, 2000

Ms. Helen Dwojak
Social Services Agency Children and Family Services
POB 14174/301 The City Drive
Orange, CA 92863-1574
(cc: Inclusive, Extensive and Ongoing)

RE: Kendall and Preslie Hardwick

Ms. Dwojak:

I must admit that after the rude and boorish treatment you gave me during yesterday's phone call, I was a little taken aback. You hung up on me at just the perfect time for me to realize that you know what I know: Namely, you have NO CASE against my sister-in-law, Deanna Hardwick. You've stolen her children from her without good or legal cause, and you have NO idea what to do about it. The manner in which you so easily controlled our conversation with your abusive power over the situation when I was simply asking for some honest answers to very simple questions is quite disconcerting. You had no intelligible answer to any of my questions because you obviously aren't accustomed to nor will you tolerate being questioned. As to the matter of Deanna Hardwick, all your answers are contradictory. Therefore, you simply hold hostage her children, avoid any questioning, and pretend there are horrendous innuendoes behind

questions asked by a concerned parent and a family member. It is due to this type of ill treatment by your organization that I have become increasingly concerned for my nieces and their well being under your "care." It was this same type of ill treatment that led to Kendall's ongoing abuse for 4 years by her father, as your office did nothing when her mom first came to you for help. Your office is doing an even worse job now that Kendall is actually talking about the molestation.

I understood you to be a supervisor. What I witnessed in our conversation was far beyond the nightmares I had already experienced with your subordinates (Marcia [sic] Vreeken and Patricia Dumas). During that call and the preceding messages left you, I made it clear as a tax payer, an American citizen, and a concerned and loving uncle, I was simply requesting reasonable answers to some very important questions I had concerning my nieces, as well as why I have been subjected to once a week visits when there are no allegations about me at all in this. I requested to discuss these issues quickly and calmly due to my recent heart attack. You chose instead to take that request as either a joke or an opportunity to play on my physical weakness as you began the conversation with a controlling, aggressive and impolite manner from the onset. And it only got worse from there.

At this point, I have received nothing but conflicting and nonsensical reasoning as to why my entire family and I suddenly one day were put on monitored visits once a week when seeing my nieces. The excuse I was

given from Ms. Vreeken (which she will surely not deny) was that "Kendall told her that she was told by a social worker that she would be released from the facility the following day." Apparently and conveniently this is one of the BIG-no-no's at your facility. Marcia [sic], rather than ask Kendall which social worker told her this (or even assume that Kendall wanted out of there so badly that perhaps she misinterpreted something one of your workers said), used that as a lame excuse to excommunicate my entire family from freely visiting our nieces. Now it is impossible for any normal or regular visits from any of us, as we all have jobs. In short, she punished both my entire family, who is not on trial, as well as the girls – whom you are suppose[d] to be protecting and strengthening – by not allowing us reasonable access to them so we can give them our loving support which they are accustomed to enjoying. While Marcia's [sic] reasoning was absurd, it is consistent with how your office has handled this case. (Maybe a social worker *really did* tell Kendall she would be released to go home.)

Your office is clearly up against the wall with regards to evidence against Deanna (or the lack thereof). Apparently your only recourse is to simply abuse your authority and create problems for her; because as you well know, there is NO EVIDENCE of ANY abuse (verbal, physical, or any other) that you can lawfully use against Deanna Fogarty-Hardwick. How dare you and your staff misuse the authority we the people have entrusted you with!

I wonder if you are familiar with the following: "The Mission of the California Department of Social Services is to *serve, aid,* and *protect* needy and vulnerable children *and* adults in ways that *STRENGTHEN* and *preserve families*, encourage *personal responsibility*, and *foster independence*." Ms. Dwojak, you and your co-workers have CLEARLY forgotten what your main focus is with regard to your job and obligations therein. My experience with all three of you has been filled with nothing but abuse – the very antithesis of your mission statement.

Ms. Dwojak, you made several unfounded statements to me such as, "YOUR ENTIRE FAMILY IS CRAZY," as well as "EVERYONE IN COURT IS LYING" (interesting you mentioned that one, since the only parties I understand to have taken oath and testified so far are your co-workers and my brother, the accused). How can you make an assessment having NO knowledge of my family or me? You also told me that I was on monitored visits "BECAUSE *I* SAY SO," and you refused to even discuss the reason Marcia [sic] had given to me in front of several witnesses. I tried to tell Marcie yesterday that she is pre-judging some very good people. I mentioned to Marcie that one such person she pre-judged is the Chaplain for both the FBI and the LA Fire Department (grandfather, Bob Smalley) entrusted by them through extensive background searches to minister to special agents and firefighters. Marcie simply laughed in jest, much the same as she had done months prior to my autistic niece ("slightly autistic," as Marcia [sic] likes to

flippantly describe her) when Kendall described to her that one of your people was "threatening." "Threatening" being a term your office and the court ignorantly describe as being one a fourth grader should not have in her vocabulary. My wife, Nicole Hardwick, is an educator holding a master's degree in education and is very experienced not only with children of this age, but autistic children as well. She took a survey of several third and fourth graders on this topic and has literally dozens of written statements from these children showing proof that not only refutes that ridiculous opinion, but makes the opinion appear as ignorant as just about every other decision this court and your office has made.

Therein lies my deepest concern. Kendall has told me personally that the horrid molestation she experienced at the hands of my biological brother, Cary Hardwick, did in fact happen. And I believe her. Rachel Davis, Marcia [sic] Vreeken and Patricia Dumas have all told me they believe Kendall as well. But if you and your attorneys continue to proceed as ignorantly as you have with regards to Deanna, Cary will get away with some horrific crimes. You will once again be responsible for placing those children back in the hands of their molester father.

Let me make this clear: I will not rest nor will I stop telling anyone who will listen regarding this injustice. Cary Hardwick, Deanna Fogarty-Hardwick, and your office are held under a gag order not to discuss this case. I am not. I told you this yesterday and I have already started the process. When the public learns of

your abusive, uncaring treatment of a former Miss California, a loving and protective mother, and a wonderful human being who came to you asking for protection for her autistic 9 year old abused daughter who was crying out for help, I am sure they will be as appalled as I am. I just pray to God the right people are held accountable for their actions.

Sincerely,

/s/ Kevin C. Hardwick
Kevin Hardwick
Long Beach, CA

cc: Mike McMichael (Program Manager),
Marcia [sic] Vreeken and Patricia Dumas of
Social Services, Orange CA
Ms. Rita Saenz, Director CA Dept. of
Social Services, Sacramento CA
Mayor Christina Shea of Irvine
Judge Robert Hudson of Orange
Mary Shumate & Assoc., and Deanna Hardwick
To the press in general, which I have already
begun via network e-mails open-ended.

EXHIBIT NO. 313

* * *

☒ IN EVIDENCE (Date) MAR 01 2007

* * *

LAW OFFICES OF
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April 14, 2000

EVIDENCE CODE SECTION 1152
PROTECTED COMMUNICATION

Joyce Riley, Deputy
Orange County Counsel
10 Pacific Center Plaza
P.O. Box 1379
Santa Ana, CA 92702

Re: In the Matter of Kendall Hardwick and Preslie Hardwick DP 002 001, DP 002 002, Orange County Superior Court – Juvenile Division, DSS No. 0D57376

Dear Joyce:

This letter is intended to be an *Evidence Code* Section 1152 communication written in an effort to reserrect discussions concerning the resolution of the Section 300(c) counts filed against Deanna Hardwick consistent with previous discussions between County Counsel, Social Services and all counsel. This communication also will address certain other issues of recent vintage in an attempt to resolve same. This communication is also addressed to County Counsel, since County Counsel represents Social Services, although most of the comments and topics addressed herein pertain to Social Services and not County Counsel.

It is with great consternation that I am compelled to write this communication.

I am most disturbed and disgusted, yet I am not surprised, based on the conduct of the Orange County Social Services Agency and the participation and callous conduct of certain of its social workers involved in the current events of this particular case, upon receiving certain recent information in this case that I will address hereinafter.

To place my comments and statements referred to herein in proper context and perspective, a brief updating and factual chronology is necessary.

On or about November 16, 1999, a Juvenile Dependency Petition under Welfare and Institutions Code §300 was filed against Mr. Cary Hardwick

(hereinafter referred to as "father") for alleged molestation claims brought by his daughter Kendall Hardwick, specifically Section 300(d), for sexual abuse. At this time, the children remained in the custodial care of their mother, Deanne [sic] Hardwick (hereinafter referred to as "mother"), notwithstanding the filing of a First Amended Petition on or about January 6, 2000, alleging unfounded 300(c) counts involving mother, until approximately February 17, 2000, at which time referee Gary Bischoff in Department L31 of the Orange County Superior Court – Juvenile Division ordered the removal of the Hardwick children from their mother's custody, without a hearing, without taking testimony or sworn affidavits, after an off-the-record discussion with counsel, without affording mother the right to "due process," without knowing the social worker, on February 17, 2000. Marcie Vreeken, (who was present in Court) recommended (1) that mother should continue to have custody of the Hardwick children, (2) the children should not be removed from the mother by the court based on her investigation to date, and (3) that there was no conduct by mother that warranted removal of the children. Unfortunately and most regrettably, Ms. Vreeken did not step forward and intervene with the Court at said hearing to voice her opinion and recommendations to protect the Hardwick children at that time, and remained silent on that issue. I am also uncertain why County Counsel on behalf of Social Services did not intercede to make Social Services' position clear to the Court to avert the removal of the

children from Mother contrary to Social Services' recommendation.

As a matter of fact, based on the testimony of Marcie Vreeken and Rachel Davis during the pending trial, mother had not violated any court orders, had not frustrated or interfered with any of father's visitation, had not coached or alienated the children, had cooperated with scheduled visitations and the Social Services social workers established rules and procedures, and that there was no evidence or facts to their knowledge at that time to support any order of the Court taking the children away from mother.

The nightmare continues unabated, without proper resolution.

On or about the week of March 28, 2000, prior to commencing trial testimony it was discussed with Marcie Vreeken (social worker), County Counsel, mother's counsel, father's counsel, children's counsel, and reported by Social Services (Marcia [sic] Vreeken) that the children were (as reported by Pat Dumas (social worker)) becoming more and more depressed and in a serious psychological state (flat effect, etc.), serious enough to warrant a recommendation that the children attend an emergency session with Dr. Mitchell, the children's psychologist (of approximately one year), to deal with the Hardwick children and this critical situation. The children were eventually seen by Dr. Mitchell (in therapy) on March 29, 2000 (the day after a missed appointment by the foster parent),

and issued her report on March 31, 2000, at the request of Social Services.

Additionally at that time, Ms. Vreeken stated that it would be appropriate under the circumstances that the children be returned to their mother's custody, (the children expressed a strong desire to return home to their mother), back in their own respective schools, and placed back into their normal family environment, situation and structure to stabilize these children.

On or about that date, all parties and counsel attempted to resolve the situation informally, which included a discussion involving dismissing all of the "c" counts filed against mother, Mrs. Hardwick, (since the court had previously indicated (based on the comments of County counsel, other counsel and the state of the evidence and informal offers of proof), that it was questionable and improbable that County Counsel could sustain the "c" counts against mother given the state of the evidence and the anticipated failure of carrying the burden of proof) and even discussing submitting the matter involving the "c" counts to the court for decision based on the evidence presented to date (anticipating that the Court would dismiss the "c" counts), which would result in immediately returning the children to their mother. Although Ms. Vreeken had recommended such a process (and did not oppose same), her recommendation was immediately overridden by her supervisor, Ms. Dwojak, who apparently aborted the resolution process and refused to allow Social Services to recommend the return of

the children to their mother or proceed as previously discussed, without any explanation or cause, in a rude and belligerent manner, and which prevented County Counsel from proceeding as previously discussed herein.

On or about March 31, 2000, Dr. Mitchell issued a written report (a copy is enclosed herein) wherein she opined the following:

1. "Kendall . . . shows signs of emotional regression."

2. "She [Kendall] was tearful throughout the session, begging to go home."

3. "Kendall appears terrified in a new school and pleaded to return to her mother's home."

4. "Her affect was flattened which is a sign of emotional blunting."

5. "Throughout the session, Kendall showed signs of extreme emotional liability, after breaking into tears."

6. "She [Kendall] doesn't know how much longer she can cope and visibly shook while relating this to this psychologist."

7. "These children have great difficulty with changes and transitions." [Kendall is diagnosed as being mildly autistic].

8. "They are prone to extreme anxiety when their structured life has been interrupted."

9. "As their psychologist, I am very worried about the girls, particularly Kendall."

10. "She [Kendall] appears to be highly stressed and not handling the prolonged placement."

11. "It is clinically a concern that Kendall appears to be withdrawing into herself . . ."

12. "I strongly encourage and request that the matter of the children's placement be reviewed with careful attention given to the regression in Kendall's socio-emotional functioning."

Notwithstanding Dr. Mitchell's clinical concern for the children's deteriorating emotional functioning and her recommendation that the children are in immediate need of stability and structure (returned to their caretaker (mother)), Social Services (and County Counsel) has done nothing in this regard to protect the Hardwick children, return the children to their mother, or act on Dr. Mitchell's recommendation. I might add that Dr. Mitchell has been the children's psychologist for approximately one year and has established a very close, comfortable and trusting professional bond and relationship with these children which has enhanced the therapeutic process to insure success in treatment.

I do not understand why Social Services (and County Counsel) has blatantly refused to act on Dr. Mitchell's report and recommendation (since they

refused to explain their position or discuss the matter with counsel) which belies any sense of responsibility or integrity on the part of Social Services or any modicum of protection or resolution for the Hardwick children.

It has become blatantly obvious since the introduction of Ms. Vreeken and Ms. Dwojak into this case, after the termination of Rachel Davis as social worker in this matter, that Social Services has lost sight of why the original Petition was filed (molestation and sexual abuse charges against the children's father) and for reasons only known to the Social Services Agency, Social Services has elected to shift its focus to mother and has been attempting to, not only attack and discredit her wrongfully, but has for the most part engaged in miscommunication and/or fabrication to place Ms. Hardwick in poor light, rather than focusing its effort on the 300 "d" counts which are most paramount in this situation to protect these children. Social Services has shown a total lack of responsibility and duty to protect the Hardwick children, and instead has carried on a relentless witch-hunt campaign against Mrs. Hardwick (mother) at the expense of its case against Mr. Hardwick. Shame on Social Services! Shame on their resolve to travel the wrong road in this litigation at the expense of these children.

There is now another serious situation that has raised its ugly head in this matter and again illustrates Social Services' continued lack of responsibility and duty to protect the Hardwick children and to do

the right thing. Mother is most concerned and upset over this matter. It has been requested by Ms. Hardwick and recommended by Dr. Mitchell that the children should attend psychological therapy sessions with Dr. Mitchell at least once per week to assist the children in their emotional difficulties.

It has also come to our attention that although the children were seen on an emergency basis on March 29, 2000, the children have not been seen by Dr. Mitchell since that date (almost three weeks now) and this is very disconcerting and upsetting to Ms. Hardwick. When will this nightmare end? When will Social Services' irresponsibility stop for the Hardwick children?

We also understand that Social Services has taken the position that it is inconvenient for the foster parents and Social Services to transport the children from wherever they are located with the foster parents (in South Orange County, next to North San Diego County) to Dr. Mitchell's office in Long Beach, to facilitate the once a week therapy sessions. It is really a shame and a tragedy that Social Services did not think of this contingency situation or problem before they irresponsibly acted in this matter and placed the children in foster care in the furthest point of the Orange County line, next to San Diego. Had Social Services placed the children into a foster care placement in the Long Beach or Seal Beach area, (there was a Seal Beach alternative available), we would not be experiencing any of these problems, and

the children would be back in their normal school (near their friends) where they belong.

It is also our understanding that since Social Services cannot accommodate Dr. Mitchell's once a week therapy sessions for the children, that it is now probable that the children will have to be attending psychological therapy sessions with a substitute therapist that is located closer to the foster parents' home, which means that they would have to sever their professional ties with Dr. Mitchell and which again, will probably be most traumatic and emotionally damaging to these children. You will recall that Dr. Mitchell opined that the "children have great difficulty with changes and transitions." Apparently Social Services is not listening or choose to ignore such advice.

Be advised that Ms. Hardwick does not approve of or consent to such a severance of the psychotherapist-patient relationship between Dr. Mitchell and the children, and she is requesting that the Social Services do all that it can to provide transportation for the children from the foster home placement to Dr. Mitchell's office once a week to attend these sessions. Ms. Hardwick *adamantly opposes* such a move to provide a new therapist for the children at this time given what Dr. Mitchell has classified as their fragile emotional state.

In the event Social Services or the foster parents are not willing to do so, Ms. Hardwick proposes that she will pay and arrange for (with the approval of Social Services) a transportation method so the

children can be transported from the foster home to Dr. Mitchell's office once a week to attend their therapy without any inconvenience or cost or obligation to the Agency or the foster parents.

Ms. Hardwick has been most cooperative with Social Services in this very difficult time for her considering that Social Services has effectively taken the children away from her without just cause (and continue to have the children away from her without just cause) and she has been met with subterfusion, delays, excuses, non-communication, fabrication, and irresponsible action on the part of Social Services. There have been instances when Social Services social workers have failed to give pertinent information to Ms. Hardwick or her counsel and then a week or so later, claimed to have given such information, and same was false (among numerous other examples).

Given the history of this case and the horrible conduct of Social Services and its social workers, I must request that any communication between Social Services and Ms. Hardwick, be done in writing and hand delivered to Ms. Hardwick's counsel or Ms. Hardwick, who will be present in court every afternoon from 1:30 p.m. to 5:00 pm., until trial is over, which I estimate will be another two or three weeks. There should be no excuse that social workers have no access to Ms. Hardwick or her counsel since they can be found daily in the afternoon across the mezzanine at the courthouse in Department 31 in Orange County.

As an aside, given the upcoming Easter vacation, Ms. Hardwick is requesting that she be allowed to attend her church services at her and the children's church in Seal Beach with the children on Easter Sunday and that Social Services provide the appropriate monitor or she will pay for a private monitor recommended by Social Services to facilitate same. This request has been previously made verbally to Ms. Vreeken, but we have had no response to date. Now this demand and request is made in writing and I expect a response no later than Monday, April 17, 2000, since Ms. Vreeken will be testifying in the afternoon on that date and available for response.

In closing, and in an effort to resurrect settlement resolution in this matter, I can only state that it is most unfortunate and regrettable that the Hardwick children remain away from their mother and detained in foster care placement, for no just cause, and that the children continue to remain on a day to day basis in such a precarious and damaging situation, which only adds to the tremendous emotional strain and stress that they have suffered since their removal from their mother on February 17, 2000. With every day passing, the Hardwick children suffer additional psychological and emotional damage and trauma, not to mention the tremendous stress and strain and emotional distress suffered by Ms. Hardwick due to the loss of her children at the hands of Social Services. I urge Social Services to reconsider its conduct in this matter, reconsider its recommendations, and urge Social Services and County Counsel

to take the initiative, as directed by Judge Bischoff, to terminate the foster care placement of these children and return them to their mother immediately.

Referee Bischoff on more than one (1) occasion has commented in open court to Ms. Vreeken and all counsel that Social Services has the absolute discretion and authority (without the need for a court order) to return the Hardwick children to their mother, if they deem it appropriate, notwithstanding the "c" counts or pending trial. Tragically, his comments have fallen on deaf ears. I trust my message has been heard loud and clear and immediate settlement discussions commence to resolve this matter without further delay.

Very truly yours,

Peter T. Hermes

PTH:It

cc: Ms. Deanna Hardwick
Rita Sanez, Director of California Department of Social Services
Larry Leaman, Director of Orange County Social Services Agency
Mike McMichael, Program Manager
Helen Dwojak, Social Services Supervisor
Marcie Vreeken, Senior Social Worker

No. G039045

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

FOGARTY-HARDWICK

vs. NO. 01CC02379

COUNTY OF ORANGE

APPEAL FROM THE
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

HONORABLE RONALD L. BAUER,
JUDGE/COMMISSIONER

CLERK'S TRANSCRIPT

(Filed Nov. 6, 2007)

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[SEAL]

GOVERNOR'S OFFICE

October 16, 1995

To the Members of the California Assembly:

I have today signed Assembly Bill No. 1355.

This bill would provide that the civil immunity of juvenile court social workers, child protection workers and other public employees authorized to initiate or conduct investigations or proceedings pursuant to the juvenile court law shall not extend to acts of perjury, fabrication of evidence or obtaining testimony by duress fraud or undue influence if any of these acts are committed by malice.

Social Workers practicing in the child dependency area are burdened with the extraordinary task of deciding when to set into motion the procedures for removing children from homes in which they may be

endangered. Statutory provisions and the courts have conferred upon them extraordinary authority and absolute immunity from civil liability for any abuse of their authority.

There is good reason for those charged with protecting the most vulnerable of Californians to be armed with exceptional powers. Nonetheless shielding public employees from liability when they have engaged in malicious and egregiously false and wrongful conduct cannot be justified.

Several recent cases have graphically illustrated that some social workers abuse their absolute immunity in ways that subject children to harm much greater than any that existed in their homes. AB 1355 seeks to preserve the ability of social workers to perform their duties to protect children with honest zeal, but not malice that destroys innocent reputations, and destroys families.

The child protection system is designed to protect children from abusive parents, but who protects children from the abuses of the system? Just last month the California Court of Appeal, Fourth Appellate District in *Steers v. Young* 95 Daily Journal DAR 12547 urged that the application of absolute immunity in child abuse cases receive the earnest reexamination of the Legislature.

This bill, like most, is less than perfect but injects into a troubled system a degree of accountability that will continue to protect child protection workers from all but malicious acts. It will give the zealous

and honest child protectors essentially the same qualified immunity that protects police officers in the honest performance of their duties.

The bill would be improved by a pleading hurdle requiring a preliminary showing of probability that the plaintiff will prevail. In the absence of such a pleading hurdle, I would hope that conscientious juvenile court judges will compel the attendance of the social worker and test the evidence where it seems appropriate, consistent with needed confidentiality, rather than relying exclusively upon the written record. Also, the bill on its face has exclusive application to juvenile court social workers and child protection workers, and does not apply to judges or prosecutors or their employees acting at their direction and within the scope of their authority.

The fact that the bill might have been improved by an explicit statement to that effect, as well as by the inclusion of a pleading hurdle, is not sufficient reason to withhold my signature from a needed reform.

Cordially,

/s/ Pete Wilson
PETE WILSON

GOVERNOR PETE WILSON •
STATE CAPITOL • SACRAMENTO, CALIFORNIA 95814

AB 1353

Date of Hearing: April 19, 1995

ASSEMBLY COMMITTEE ON JUDICIARY
Phillip Isenberg, Chair

AB 1355 (Knowles) – As Introduced: February 23, 1995

KEY ISSUE: SHOULD THE *ABSOLUTE* PROSECUTORIAL IMMUNITY FROM CIVIL SUIT ENJOYED BY JUVENILE COURT SOCIAL WORKERS AND CHILD PROTECTION WORKERS AUTHORIZED TO INITIATE INVESTIGATIONS OR PROCEEDINGS IN JUVENILE COURT BE LIMITED TO THE *QUALIFIED* CIVIL IMMUNITY ENJOYED BY PEACE OFFICERS?

BACKGROUND

History. California courts apply the same absolute prosecutorial immunity enjoyed by prosecutors to social workers, and interpret it to include their investigations and decisions to intervene in child abuse cases. They cite as justification that, absent such protection from lawsuits, the willingness of social workers to intervene to protect a child endangered by child abuse would diminish due to fear of retaliatory suits [*Jenkins v. County of Orange* (1989) 212 C.A.3d 278, 287]. Federal courts have also extended absolute immunity from civil rights suits to social workers [*Myers v. Contra Costa Co. Dept. of Social Services* (9th Cir. 1987) 812 F.2d 1154].

By contrast, peace officers enjoy only a qualified immunity from civil liability, which shields them from liability for actions they take in enforcing the law, but only for decisions made in the good faith exercise of their official responsibilities. Their actions must be found to have been "objectively reasonable." [*Sellers v. Procunier* (9th Cir. 1981) 641 F.2d 1295, 1300; *Pierson v. Ray* (1967) 386 U.S. 547].

* * *

There have been several unsuccessful attempts over the past few years to establish some form of liability for social workers in dependency cases – AB 2140 (Honeycutt) and SB 1790 (Johannessen) in 1994; AB 1837 (Frizzelle) and AB 2859 (Frizzelle) in 1990; and AB 2394 (Frizzelle) in 1992. SB 41 (Johannessen) is presently before the Senate Judiciary Committee.

Facts. A chasm lies between the differing facts presented by proponents and opponents, indicating deep and emotional convictions about the subject matter:

1) In a letter to Assembly Public Safety Committee members, the 1992 San Diego County Grand Jury expressly called for legislation changing the immunity provisions governing social workers in the child abuse system, citing "an inherent bias in the system" towards intervention and removing children from the home, citing the "unwillingness of Children's Service Bureau staff, from line to administrative, to listen to opposing views to the point of being hostile and threatening," and citing, also, evidence of social workers "so obsessed

with molestation scenarios that they were unable to maintain even a semblance of objectivity."

* * *

1) *Author's Statement.* "Social workers now have a civil immunity which surpasses the civil immunity of anyone else in our nation; even presidents, legislators and prosecutors are accountable to the political process and the consent of the governed. Currently there does not exist any effective check upon the arbitrary power or absolute immunity of social workers. Such a situation is antithetical to the American political philosophy and history of a system of accountable government power."

As an example of the kind of harm that social workers who are unaccountable for their actions can cause, the author cites the *Alicia Wade* case in San Diego:

> Eight-year old Alicia was abducted through her bedroom window, raped, then returned to her room. In spite of the fact that several young girls had been abducted and raped in a similar manner in that area, the social worker and county decided that Alicia's father was the perpetrator. Alicia was removed from her family and placed in foster care.
>
> For 13 months, Alicia insisted that a stranger, and not her father, was responsible. Alicia's first foster mother believed her and, as a result, Alicia was removed from her care and placed with another

> foster family who was "more appropriate." Finally, after much interviewing and coaching by the social worker and second foster mother, Alicia recanted and named her father.
>
> Alicia's mother was hospitalized and near-suicidal. Her older brother was ostracized and tormented by classmates and neighbors. Her father went through hell. In spite of the father's urging that the county look to the man accused of the other rapes, no one considered it an option and no one DNA-tested semen stains on Alicia's underwear until the point at which the Wade's paternal rights were being terminated and Alicia freed for adoption by her current foster parents – almost two years after the rape occurred.
>
> When the DNA tests finally were performed, they excluded the father and matched the man in jail for the other rapes.

2) This committee received many letters from private citizens' urging passage of the bill to assure accountability on the part of social workers. Some were identical letters drafted as part of a concerted campaign and merely signed by individuals. But many others indicated deep thought and conviction, and demonstrated the writers had taken time to carefully consider the twin concerns of protecting children from abuse while also protecting families from abuse from the legal

system. Those letters echo sentiments expressed by the 1992 San Diego Grand Jury:

> "There is concern over the system's tendency to become numb to the impact these cases have on children and their families; to lose touch with the pain and difficulty of having children removed from the family home and placed in another setting. Court time and real time are worlds apart, so that while a case drags on from week to week and month to month, the agony of separation continues . . . While Court cases often require lengthy investigation and preparation to ensure due process of law to all involved, it must never be forgotten that these cases are ultimately about living, breathing human beings."

3) The Committee also received a copy of the 1993 Santa Clara County Grand Jury Report, which acknowledged that progress had been made by that county's children's services department, but found major areas in need of attention, including checks and balances relating to internal processes within the department, and a noticeable absence of management and individual accountability in decision-making. They noted "that sometimes it does not take much of an allegation to land a child into the system" and "once you are in the system you are in for life."

* * *

Judicial Council of California Civil Jury Instructions (CACI)

Series 1500 MALICIOUS PROSECUTION

1-1500 CACI 1500

1500 Former Criminal Proceeding

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*] **was actively involved in causing** [*name of plaintiff*] **to be prosecuted [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff*]**'s favor;]**

[3. That no reasonable person in [*name of defendant*]**'s circumstances would have believed that there were grounds for causing** [*name of plaintiff*] **to be arrested or prosecuted;]**

4. That [*name of defendant*] **acted primarily for a purpose other than to bring** [*name of plaintiff*] **to justice;**

5. That [*name of plaintiff*] **was harmed; and**

6. That [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 3 above, whether a reasonable person in [*name of defendant*]'s circumstances would have believed that there were grounds for causing [*name of plaintiff*] to be arrested or prosecuted. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

1501 Wrongful Use of Civil Proceedings

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully brought a lawsuit against [him/her/it]. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*] **was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff*]**'s favor;]**

[3. That no reasonable person in [*name of defendant*]**'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against** [*name of plaintiff*]**;]**

4. That [*name of defendant*] **acted primarily for a purpose other than succeeding on the merits of the claim;**

5. That [*name of plaintiff*] **was harmed; and**

6. That [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**' s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] **has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether** [*name of plaintiff*] **has proven the following:**

[*List all factual disputes that must be resolved by the jury.*]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.*]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

1520 Abuse of Process –
Essential Factual Elements

[*Name of plaintiff*] **claims that [***name of defendant***] wrongfully [***insert legal procedure, e.g., "took a deposition"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] [***insert legal procedure, e.g., "took the deposition of [name of deponent]"***];**

2. That [*name of defendant***] intentionally used this legal procedure to [***insert alleged***

improper purpose that procedure was not designed to achieve];

3. That [*name of plaintiff*] **was harmed; and**

4. That [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**'s harm.**

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**SUPERIOR COURT OF
THE STATE OF CALIFORNIA**

COUNTY OF ORANGE

DEANNA FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE et al., Defendants.	Case No. 01CC02379 Judge Ronald L. Bauer, Dept. CX-103 OPPOSITION TO MOTION FOR ATTORNEYS' FEES ON APPEAL; DECLARATION OF ROBERT M. DATO; EXHIBIT Date: Dec. 13, 2010 Time: 10:30 a.m.

INTRODUCTION

Defendants County of Orange, Marcie Vreeken, and Helen Dwojak (collectively the County) do not challenge the total number of hours claimed by plaintiffs' various attorneys on appeal (with the exception of one task). However, the County does challenge the hourly rates requested by the ten lawyers who worked on the appeal. * * * Here, the Court of Appeal determined that the opinion in this case would not be published. The opinion thus has no precedential value. The Court of Appeal also reversed the injunction against the County, thereby removing any impact this case has beyond the parties involved.

* * *

B. The Court of Appeal's Unpublished Opinion.

This court is no doubt familiar with the Court of Appeal's opinion, which affirmed all aspects of the monetary judgment. However, the court ordered that the opinion was not to be published in the Official Reports. In addition, the Court of Appeal reversed both aspects of the injunction that had been issued against the County:

* * *

IV

No Lodestar Should be Awarded.

* * *

The Court of Appeal's opinion was not unprecedented. It was "nonprecedented." The opinion was not

certified for publication. * * * The Court of Appeal here concluded that the resolution of the legal issues in this case were not sufficiently novel to warrant publication. The opinion cannot be cited as legal precedent. In addition, the Court of Appeal reversed the injunction against the County, so this case will not have a legal impact beyond the parties.

"*[D]ifficult issues and a skilled adversary. . . .*"

However difficult the issues may have appeared * * * the fact is that the Court of Appeal determined they were not sufficiently difficult or novel to warrant publication of the opinion.

* * *

Dated: November 29, 2010

BUCHALTER NEMER, PC
BEAM, BROBECK, WEST, BORGES & ROSA LLP

By: /s/ Robert M. Dato
Robert M. Dato

Attorneys For Defendants
COUNTY OF ORANGE,
MARCIE VREEKEN, and
HELEN DWOJAK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JONATHAN M., Petitioner; v. THE SUPERIOR COURT OF ORANGE COUNTY Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.	G043674 (Super. Ct. Nos. DP017854, DP017855, DP017856) OPINION

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted. Stay issued.

Lawrence A. Aufill, under appointment by the Court of Appeal, for Petitioner.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Real Parties in Interest.

Law Office of Harold LaFlamme and Yana N. Kennedy, for Minors.

INTRODUCTION

In this dependency case, Jonathan M. seeks writ relief from an order reducing his visitation with his children from once per week to once per month, made at the same time the court terminated the reunification efforts between his wife and the children and set the matter for a Welfare and Institutions Code section 366.26 selection and implementation hearing.[1] Jonathan argues the court abused its discretion in reducing the amount of visitation, because the children enjoyed their visits with him, and the decision to terminate mother's reunification services in no way related to the frequency of his visitation. He suggests the court's reduction of visitation in anticipation of the selection and implementation hearing harmed his ability to prove he enjoyed the sort of beneficial relationship with his children that might justify an

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[1] All further statutory references are to the Welfare and Institutions Code.

exception to the presumption favoring adoption as the permanent plan for these children.

We conclude Jonathan is correct, and the trial court abused its discretion. There is no evidence Jonathan's visitation schedule was presenting a problem for the children, and no suggestion of any changed circumstances that would have militated in favor of a reduction in that visitation. As far as we can discern, the only change was that *mother's* reunification period ended. That change did not, in and of itself, have any effect on Jonathan's visitation.

Moreover, an order reducing visitation, made in conjunction with the order setting a selection and implementation hearing is particularly problematic, because establishing the existence of a beneficial relationship between parent and child which outweighs the perceived benefits of adoption, is one of the few arguments available to stave off termination of parental rights when a dependency case gets to the permanency stage. And reducing visitation, especially by 75 percent, clearly undermines a parent's ability to make such an argument.

We consequently conclude the court abused its discretion by reducing Jonathan's visitation, for no apparent reason other than anticipation of the selection and implementation hearing. We reject Jonathan's suggestion the decision may have been "punitive" in nature. It appears instead to be an attempt at expediency and a reflection of the tendency to lump the parents together in dependency cases. But in either

case, it was erroneous, and we consequently grant Jonathan's petition for writ relief.

In light of the tight timeframe between the filing of Jonathan's writ petition (June 18, 2010) and the court's scheduled selection and implementation hearing (September 1, 2010), we note there is, as a practical matter, little relief we can offer in the absence of an order staying the section 366.26 hearing, which Jonathan has requested. We consequently grant that stay for a period of three months, i.e., until December 1, 2010, and remand the case to the juvenile court with directions to reinstate Jonathan's prior weekly visitation schedule during that period, and to reschedule the selection and implementation hearing for a date after December 1, 2010.

FACTS

The children involved in this case are Jonathan, Jr., (age five), Anabel (age three), and Nathan (age 22 months.) They were detained in November of 2008, after both parents were taken into custody on various charges relating to a series of robberies and gang crimes.

In a highly disturbing turn of events, SSA filed an amended petition adding a count under section 300, subdivision (d), alleging that since Jonathan, as an adult, had sexual relations with the children's mother when she was a minor, he had "sexual[ly] abuse[d]" her, and, as a consequence, the children were "at risk of sexual abuse by [him.]" To be clear,

Jonathan is less than two years older than the children's mother, and thus if he was an adult when they were having sex, she was at least 16 years old. We fail to see the connection between that conduct and an increased likelihood he would sexually abuse his children who, at that point, were all under the age of five.[2] The purported risk seems especially unlikely when we consider the fact that at that point, SSA was reporting Jonathan would be incarcerated "*longer than 50 years*." Indeed, that anticipated length of incarceration was the sole basis of the recommendation in SSA's report that he be denied reunification services.

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[2] What the record shows is that the children's mother reported to the social worker she had started dating Jonathan when she was 12 years old (he would have been no more than 14 years old); she had their first child, Jonathan Jr., when they were both minors; and they began cohabitating when she was 15 years old (and he no more than 17 years old.) Mother explicitly denied any concern that the children were at risk of sexual abuse by Jonathan, and noted she had worked with a social worker during the time she was pregnant with Jonathan, Jr. Her suggestion that SSA was well-aware of the facts underlying its claim of "sexual abuse" at the time of the events in question is supported by SSA's own records, which reflect that both Jonathan and the children's mother were fairly extensively "involved with" SSA as minors. Moreover, SSA explicitly acknowledges it had received a report back in March of 2004 that the mother "was staying with her boyfriend," and in May of 2004, it was aware she was "pregnant as a result of voluntary sexual relations with her boyfriend. . . ." Jonathan, Jr., was born five months later. Apparently, it did not occur to SSA to suggest Jonathan might be guilty of "sexual abuse" at that time.

Less than two weeks later, both the children's mother and Jonathan submitted to jurisdiction on an amended petition which included only a "failure to protect" allegation under section 300, subdivision (b), and a "no provision for support" allegation under section 300, subdivision (g). In connection with that agreement to submit, SSA simply dropped the explosive "sexual abuse" allegation.

Ultimately, mother was offered reunification services, but they were denied to Jonathan.[3] Moreover, from the inception of the case, and throughout the 18-month period during which reunification services were provided to mother, SSA consistently recommended that Jonathan receive only monthly visitation with the children. However, the court granted Jonathan's request for weekly visitation quite early in the case, and continued to order that level of

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[3] Welfare and Institutions Code section 361.5, subdivision (e)(1) provides in pertinent part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors."

frequency throughout the 18-month reunification period.

SSA's written report filed in connection with the 18-month hearing said nothing at all negative about Jonathan's visitation. To the contrary, it reflected only that "[t]he children report that they like to see their daddy," and that "Jonathan [Jr] explained . . . he talks to his dad on the phone." Moreover, the report did not technically include any "recommendation" concerning the frequency of Jonathan's visitation. Instead, it focused exclusively on its recommendation that reunification services be terminated for mother, and the matter be scheduled for a selection and implementation hearing. The report did incorporate a case plan, which reflected a *monthly* visitation schedule for Jonathan, but without proving any explanation as to why that might be more appropriate than his then-current weekly schedule.

At the hearing, Jonathan's attorney objected to monthly visitation schedule included in the case plan, noting that "father has been receiving weekly visitation with those children. They have been appropriate. There have been no concerns. I believe there's no detriment [caused by] the visits of the children and father. So I'd be asking for those visits to remain one time a week." In response to that objection, the children's attorney pointed out that "as to father's visitation, this is the wind-down period, and these children are very young. They are little. I am requesting that the court adopt the recommendation. I think when the court considers the facts as a whole, the ages of

the children, their need for permanency, that the recommendation as set forth by the agency is more appropriate." SSA offered no argument on the point.

As part of its ruling at the conclusion of the hearing, the court ordered that Jonathan be given only monthly visitation. In doing so, the court indicated a concern that "if [father were] moved to a state prison, . . . [he] might end up in some location far away in Northern California, [then] I'd have a concern about being able to transport the children in a car maybe eight hours each way. [¶] So what I'm going to do is order your visitation one time per month while father's in custody in Orange County jail.

Thereafter, I'll be happy to make any appropriate orders depending upon where father may be placed if he his [sic] located somewhere else. And we'll just make that determination at that time."

I

Before we address the visitation issue, a comment is in order. As we noted above, SSA filed an amended petition in this case, alleging that Jonathan posed a significant risk of sexual abuse to his small children, based upon the bare allegation he had engaged in sexual intercourse with their mother at a point when she was no younger than 16 years old, and he was not quite two years older. Moreover, SSA made this allegation at a time when Jonathan was in jail, and it was otherwise on record as stating there

was a substantial likelihood he would *remain incarcerated for as long as 50 years.*

This kind of pleading undermines confidence in the system. It damages the reputation of the Social Services Agency and causes parents to suspect the system is prejudiced against them, and social workers will use any excuse they can think of – whether credible or not – to deprive them of the custody of their children.

It has to stop. No one in government has a more important job than the employees of the Social Services Agency; no one has a more critical task than the protection of our children. It is essential to our society that this charge be carried out with compassion and fairness. Alleging that a father is a danger to his preschool children because he had sex with their mother when they were teenagers is not calculated to improve the credibility of the people who daily shoulder this burden.

As reflected in the facts underlying the other counts alleged against the parents in this case, SSA had perfectly legitimate reasons for requesting that the court take jurisdiction over these children. If SSA was concerned that those *legitimate* reasons might not be deemed persuasive enough by the court, its response should not have been to throw in an additional "sexual abuse" count – which might be interpreted as an attempt to frighten the parents into submitting to jurisdiction on the other counts.

Instead, it should have invested more consideration into the reasons it had.

With great power comes great responsibility. SSA has great power. The facts of this case and others brought to us in recent months (*see, e. g., Fogarty-Hardwick v. County of Orange* (G039045, June 14, 2010) [nonpub. opn.], and *In re Tyler H.* (G043216, Aug. 26, 2010) [nonpub. opn.]) suggest the agency has somehow temporarily detoured from its long tradition of exercising that power wisely and responsibly. We look forward to its return to that tradition.

II

Turning to the visitation issue, we start with the proposition that the court has continuing authority to make orders for parental visitation as long as the court retains jurisdiction over the case. (See, e.g., section 366.26, subd. (c)(4)(C).) Implicit in that authority is "the authority to modify the terms of visitation if the conditions warrant it." (*In re Megan B.* (1991) 235 Cal.App.3d 942, 952, recognized as superseded by statute on other grounds in *In re Steven H.* (1992) 6 Cal.App.4th. 1752)[4] We review such modifications on an abuse of discretion standard. (*Ibid.*)

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[4] In *In re Steven H.*, the court determined that a challenge to the juvenile court's order modifying visitation, where that order is made contemporaneously with an order terminating reunification services and referring the case to a selection and implementation hearing, must be brought by writ petition,

(Continued on following page)

In this case, we have no choice but to conclude the court abused its discretion. The court had previously ordered weekly visitation and the only evidence pertaining to Jonathan's visitation at the 18-month hearing was that the children *enjoyed* it. There was no evidence from which the court could even *infer* that weekly visits were proving problematic or disruptive in their lives. No party so much as suggested that. Instead, the only argument made against continuing Jonathan's visitation on a weekly basis was that the children had a need for "permanency" and the case had entered its "wind-down phase."[5] Well, the case may have entered its wind-down phase – or it may not have. There's no way to know that without prejudging the outcome of the selection and implementation hearing – i.e., whether the court would order termination of parental rights. Because if the court did ultimately decide, at the selection and implementation hearing, that termination of parental rights was not the appropriate course, this case could live on for several more years, with an order of guardianship or long term foster care for these children.

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rather than appeal. (Accord, *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149.) Jonathan did so in this case.

[5] Counsel also mentioned the fact that "these children are very young" as an additional basis for limiting visitation with Jonathan. But these children were certainly not getting any younger than they had been when the court had ordered weekly visitations with Jonathan. So presumably, their relative youth was not going to be any more a problem going forward than it had been.

And that is the real problem. It is the very purpose of the selection and implementation hearing – which the court had ordered would take place *in the future* when it terminated reunification services – to ascertain whether the case is "winding-down" to an order terminating parental rights, or whether it will proceed on to some other permanent plan. The court could not, therefore, approach that hearing on the assumption it already knew what the outcome would be. Consequently, the assertion this case is "in the wind-down phase" is the very worst basis for limiting visitation in the period before the selection and implementation hearing. The perniciousness of such an argument is particularly obvious when we consider that one of the few arguments a parent can make to avoid termination of parental rights – which is otherwise the outcome favored by statute in the case of children deemed "adoptable" – is the assertion that he or she enjoys such a significant bond with a child that the harm of severing that relationship would outweigh the benefits of freeing the child for adoption into a new family. (Section 366.26, subd. (c)(1)(B)(1).)[6] A parent's ability to demonstrate such a bond can only be undermined by a severe reduction in his or her contact with the child during the months preceding the selection and implementation hearing.

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[6] Section 366.26, subdivision (c)(1)(B)(1), provides for an exception to termination of parental rights when doing so would be detrimental to the child because "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

To be clear, we are expressing no opinion on the likelihood Jonathan would be able to prove the existence of such a bond in this case, and no opinion on the broader issue of whether these children are likely to be freed for adoption. Those issues are not before us, just as they were not before the juvenile court at the hearing in which it terminated mother's reunification services. It is for that very reason that the court should not have considered the potential "wind-down" of this case as a basis for reducing Jonathan's visitation. To the extent its decision was based upon such a consideration, it was premature.

Because the court itself gave no explanation for its decision to reduce Jonathan's visitation – and the only comment it made on the issue related explicitly to what *might happen in the future*, i.e., when Jonathan is transferred to state prison – SSA has attempted to defend the decision by speculating as to what justifications the court *might* have relied upon in light of the record in this case. We find none of them persuasive.

SSA first suggests the court might have decided to reduce Jonathan's visitation because the children had recently been moved to a new placement, because Jonathan, Jr., "did not react well to change," and because some of his stress issues "might result from overhearing adults discussing his care or placement or other things." But only one of these factors is arguably related to Jonathan's visitation schedule, and it would seem to militate *against* changing it. There is nothing to suggest that the children's new

placement made visitation with Jonathan more difficult, or that the new caretakers had registered any objection; there is no evidence that Jonathan, Jr., was hearing adults "discussing his care or placement or other things," during visits with Jonathan; and of course, if Jonathan, Jr., is resistant to change, then a *change* in visitation with his father would be likely to make things worse, not better.

SSA also argues there is evidence the children suffered "'fallout'" from visits which it concedes "appear to be with Mother," but nonetheless relies upon that "'fallout'" to suggest (without actually explaining why) the court might have concluded that reducing visitation with Jonathan would be "in their best interests." Of course, such an inference seems particularly unreasonable when we consider the fact that the "fallout" from the children's visits with mother did not cause the court to reduce visitation *for her*.

Finally, SSA suggests that the fact its reports reflect the children expressed a desire to "live with and visit" their mother, while only expressing enjoyment of their visits with Jonathan, would allow the court to infer they didn't really *want* to visit Jonathan. As SSA expresses it, "[t]he juvenile court could have viewed the evidence to support a conclusion *that enjoying visits was not the same as wishing to have the visits*." (Italics added.) We disagree. This kind of legalistic, post-hoc parsing is unbecoming a government agency that deals with children on a regular basis. When it comes to small children, enjoying it and wanting it are the same thing.

Nor do we think the fact SSA's reports reflect the children's desire to "live" with their mother, while only expressing their enjoyment of visiting Jonathan, is significant. The stated goal of the dependency proceeding, until the 18-month hearing, was for the children to be reunified with their mother and resume living with her. Presumably the children's view of that goal would be considered of some significance to the social worker. But as there was never any similar goal vis-à-vis Jonathan, and since the expectation was that he would remain incarcerated for many years, there was no reason to assess, let alone document, the children's desire to resume living with him.

Because we find none of the evidence cited by SSA sufficient to support the court's order reducing Jonathan's visitation, and we can otherwise discern no reasonable basis for the court's decision to do so in the period leading up to the selection and implementation hearing, we conclude the court abused its discretion in making that order.[7]

Unfortunately, we can do nothing to restore Jonathan's visitation retroactively. All we can do is attempt to mitigate whatever harm was caused by directing what should happen from this point.

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[7] We acknowledge, however, that the court's concern about Jonathan's potential transfer to a distant prison, and the practical effect such a move would have on the ability to facilitate visitation, is a valid one. If and when that happens, any visitation order then in effect would have to be reconsidered.

Consequently, we grant the petition for writ of mandate. We reverse the visitation order and direct the court to reinstate Jonathan's previous visitation of one time per week, effective immediately and continuing for a three month period ending December 1, 2010. The permanency hearing is stayed until December 1, 2010. The juvenile court is directed to hold the selection and implementation hearing after that date.

Petition for writ of mandate is granted.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.

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No. 10-857

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In The
Supreme Court of the United States

COUNTY OF ORANGE [CALIFORNIA],
HELEN DWOJAK, and MARCIE VREEKEN,

Petitioners,

v.

DEANNA FOGARTY-HARDWICK,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL STATUTORY PROVISION INVOLVED

California Welfare and Institutions Code section 328 provides:

Whenever the social worker has cause to believe that there was or is within the county, or residing therein, a person described in Section 300, the social worker shall immediately make any investigation he or she deems necessary to determine whether child welfare services should be offered to the family and whether proceedings in the juvenile court should be commenced. If the social worker determines that it is appropriate to offer child welfare services to the family, the social worker shall make a referral to these services pursuant to Chapter 5 (commencing with Section 16500) of Part 4 of Division 9. No inference regarding the credibility of the allegations or the need for child welfare services shall be drawn from the mere existence of a child custody or visitation dispute.

However, this section does not require an investigation by the social worker with respect to a child delivered or referred to any agency pursuant to Section 307.5.

The social worker shall interview any child four years of age or older who is a subject of an investigation, and who is in juvenile hall or other custodial facility, or has been removed to a foster home, to ascertain the child's view of the home environment. If proceedings are commenced, the social worker shall

include the substance of the interview in any written report submitted at an adjudicatory hearing, or if no report is then received in evidence, the social worker shall include the substance of the interview in the social study required by Section 358. A referral based on allegations of child abuse from the family court pursuant to Section 3027 of the Family Code shall be investigated to the same extent as any other child abuse allegation.

The County of Orange (California), Helen Dwojak, and Marcie Vreeken respectfully file this reply in support of their petition for a writ of certiorari to the California Court of Appeal, Fourth Appellate District, Division Three.

INTRODUCTION

Respondent Deanna Fogarty-Hardwick has consistently argued "waiver" in attempting to defend her multi-million dollar verdict against the County of Orange and two of its social workers for "loss of familial association." She uses this tactic again in her brief in opposition, additionally contending that the County has been less than candid with this Court. Nonsense. While the County believes that all issues were adequately preserved, its petition accurately summarized the rulings below.

Waiver was not a cornerstone of the California Court of Appeal's opinion. Rather, it addressed the merits of the County's arguments. Those arguments,

in turn, form the basis for the County's petition. Deanna has never identified *any* evidence outside the parameters of this case – other than the responses to her questionable requests for admissions – that showed a County policy sufficient to establish liability under *Monell v. Department of Social Services*, 435 U.S. 658 (1978). This Court should grant certiorari or, at a minimum, grant, vacate and remand for reconsideration in light of *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010), and cases such as *Copper v. City of Fargo*, 905 F.Supp. 703 (D. N.D. 1995), and *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991).

FURTHER REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Issues Concerning *Monell* Liability Are Properly Before This Court.

Petitioners did not "waive all their *Monell* issues," as Deanna asserts. One need look no further than the California Court of Appeal's opinion in this matter to conclude that the *Monell* liability issues are properly before this Court. In its petition, the County summarized the Court of Appeal's analysis concerning *Monell* liability as follows: "The County waived its argument concerning the lack of substantial evidence to support a County policy but, in any event, the responses to the requests for admissions constituted substantial evidence." Petn. at 20 (citing App. 36). That is precisely what the Court of Appeal held. It did not stop with a waiver analysis, but stated:

"Assuming, as the County states, it represented in discovery that its social workers (whom the jury concluded had lied and fabricated evidence) 'acted pursuant to municipal policy and custom,' that admission would be sufficient to sustain the challenged finding." App. 36. The Court of Appeal also noted the County's acknowledgment of the evidence of misconduct in the underlying dependency case. App. 24-25 n. 4.

There is no waiver here. And as will be shown below, Deanna cannot identify *any* evidence in the record – other than the responses to the requests for admissions – that would establish *Monell* liability. That is what the *Connick* case is all about.

II. Just as in *Connick*, Plaintiff Presented No Evidence Other Than From the Underlying Case to Show a Governmental Policy and *Monell* Liability.

Deanna attempts to distinguish *Connick* by identifying "evidence" beyond the confines of the underlying dependency case to establish *Monell* liability. Deanna's opposition brief conclusively demonstrates that such "evidence" does not exist.

A. The Policy of "Baseless Allegations" in Dependency Petitions.

Deanna cites to evidence of "an agency policy of charging the non-abusing parent with failure to protect the child even when it knew there was no evidence to support it." Opp. br. at 33. But as the

Court of Appeal held in this case, such an allegation is expressly permitted by California law: "Under this provision [Cal. Welf. & Inst. Code § 300, subd. (b)], it is clear that a parent's mere 'failure or inability' to 'adequately supervise or protect' the child is distinguished from the parents' 'willful or negligent' failure to do so, and that the Legislature intended *either* circumstance would be a sufficient basis for imposing dependency jurisdiction." App. 47 (italics in original). This is why the Court of Appeal *reversed* the injunction that Deanna had persuaded the trial court to impose. *Id.* As a matter of law, this allegation could not cause any compensable harm to Deanna.[1]

B. The Policy of Preventing Parents' Presence When Children Are Questioned.

Although she has never relied on it before, Deanna now claims that the County had "a policy of not allowing parents to be present when their children were interrogated." Opp. br. at 33-34 (citing Resp. App. 27-28, 91-92). The "interrogation" to which Deanna cites occurred *two weeks after* the children were removed from her custody, and thus could not have caused the harm for which the jury awarded

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[1] According to Deanna, petitioners' "protest that Fogarty-Hardwick was not harmed by their filing and pursuit of knowingly baseless allegations is also particularly baseless" and "ignore[s] the evidence." Opp. br. at 33. But it is Deanna who ignores the evidence: the Court of Appeal's express holding to the contrary.

damages. App. 9 (children removed Feb. 17); Resp. App. 27 ("interrogation" occurred on March 3). Moreover, Deanna presented no evidence (nor does she cite to any) that this policy caused her any harm.[2]

Finally, the County's policy of not allowing parents to be present when children are questioned is consistent with California law. California Welfare and Institutions Code section 328 provides that "[t]he social worker shall interview any child four years of age or older who . . . has been removed to a foster home[ ] to ascertain the child's view of the home environment." While section 328 does not *explicitly* bar a parent's presence at such an interview, it is rational for a county to conclude that a "child's view of the home environment" will be more accurate if his or her parent is not present at the interview.

C. The Testimony of Plaintiff's Expert.

Deanna relies on the testimony of her expert (William London) "that Petitioners' conduct demonstrated the County's regularly-established policies, customs, and practices with regard to the training and supervision of its social services agents." Opp. br. at 34. But London's testimony was based solely on

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[2] Deanna cites to testimony that supervisor Dwojak supposedly "didn't care" whether her workers fabricated evidence. Opp. br. at 34 (citing Resp. App. 67-70). The cited testimony only establishes that Dwojak believed Vreeken and disbelieved Deanna in this case. But in any event, Dwojak's beliefs do not constitute evidence of a County policy.

documents and other evidence *in this case*. Reply App. 3-7 (London relied on depositions, social services agency's file, Deanna's medical records, children's school records, children's therapist's records, discovery responses, and interview with Deanna). London then extrapolated a County policy of believing the social workers, disbelieving parents and children, and protecting social workers. Reply App. 8-10. Such evidence does not establish an actionable policy under *Monell*. *Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir. 1988) (expert testimony by itself insufficient to establish constitutional "fault" by a municipality); *Holland v. City of Houston*, 41 F.Supp.2d 678, 708 (S.D. Tex. 1999) ("When seeking to prove a municipality's malevolent motive, plaintiffs must introduce more evidence than merely the opinion of an expert witness").

The *Connick* case may not have had a witness like London. But it wouldn't have mattered. The testimony of an expert about the existence of a "policy" in the absence of other similar incidents is insufficient as a matter of law to establish liability under *Monell*.

D. The "Notice" Purportedly Provided by California Government Code Section 820.21 Is Irrelevant.

Finally, Deanna attempts to distinguish *Connick* by arguing that Louisiana has no equivalent to California Government Code section 820.21. That statute

purports to abrogate "any" civil immunity accorded to social workers who commit perjury, fabricate evidence, or fail to disclose known exculpatory evidence. Opp. br. at 1.

As an initial matter, section 820.21 does not apply here. In *Parkes v. County of San Diego*, 345 F.Supp.2d 1071 (S.D. Cal. 2004), the court held that section 820.21 is not applicable in a federal civil rights case, stating: "Section 820.21 does not affect federal immunity principles available to social workers for conduct undertaken in the initiation and pursuit of dependency proceedings in a Section 1983 claim." *Id.* at 1087.[3]

Moreover, Deanna fails to explain how the existence of this statute provides any meaningful distinction between the present case and *Connick*. At least since *Brady v. Maryland*, 373 U.S. 83 (1961), prosecutors have been under a duty not to lie or to fabricate or suppress evidence. The undisputed evidence in this case is that social workers were likewise aware of such obligations. App. 103-107 (social workers are not to provide perjured testimony and they may be held personally liable if they fabricate evidence). The prosecutors in *Connick* were on notice that their conduct was not appropriate, just like the social workers here; the presence or absence of a Louisiana

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[3] Although petitioners briefed this issue below, the California Court of Appeal did not rely on section 820.21 and thus the issue was not raised in the petition to this Court.

statute such as section 820.21 is irrelevant. The question is whether *Monell* liability can be premised on a single incident, not whether governmental workers "knew" their conduct was wrong.

III. Perceived Differences in State and Federal Requests for Admissions Are Irrelevant in a Federal Civil Rights Action and Played No Part in the Analysis of the *Hudson* and *Copper* Opinions.

Deanna points to perceived procedural differences between California and federal practice in dealing with requests for admissions. Opp. br. at 27-28. But she fails to show how any of them are relevant to the question posed by the petition: Is a response that a social worker's unspecified conduct complied with a county's custom or practice sufficient evidence of a governmental policy under *Monell*? The question presented deals solely with the requisite quantum of proof in a federal civil rights action. It is not relevant how the requests or the responses came about or the jurisdiction in which the case arose. As argued in the petition, one of the main problems with this case is that it demonstrates "the haphazard and inconsistent application of federal law in state tribunals." Petn. at 6.

Deanna's attempts to distinguish the federal cases rejecting responses like those at issue here are similarly misguided. For example, she claims that in *Hudson v. City of N. Las Vegas*, No. 2:04-CV-01518,

2007 U.S. Dist. Lexis 2377 (D. Nev. Jan 4, 2007), the court "already found" no constitutional violation and thus the response to the request for admission was "unimportant." Opp. br. at 25-26. Such a contention is belied by the *Hudson* opinion itself. The district court found that, "*even if* Hudson had shown Defendants violated his constitutional rights," *Monell* liability was not shown because the responses only demonstrated the "municipality's opinion regarding the constitutionality of its employees' conduct [and was] irrelevant with respect to whether a municipality promulgated a policy causing its employees to act unconstitutionally." *Id.* at *22-23 (first italics added).

Deanna claims that *Copper v. City of Fargo*, 905 F. Supp. 703 (D. N.D. 1995), does not apply because the district court "did not find the plaintiff's requests for admissions were improper, ..." Opp. br. at 26. Petitioners have never claimed that Deanna's requests in this case were "improper." Rather, the issue is whether an affirmative response to a request asking whether unspecified conduct complied with county policy is sufficient by itself to establish *Monell* liability. The *Copper* court found that it was not because the response was "only as an acknowledgement that the defendant police officers acted pursuant to existing policies and training, ... The admissions are not the equivalent of an affirmative decision, cast in the form of a policy statement, to ignore training deficiencies or to completely omit training about the proper enforcement of the residential antipicketing

ordinance." *Id.* at 708. *Copper*'s analysis applies equally to the present case.

IV. Civil Rights Plaintiffs Alleging Deprivation of Rights in Family or Dependency Proceedings Should be Required to First Show That They Would Have Prevailed in Those Proceedings.

In her opposition brief, Deanna largely parrots the California Court of Appeal's reasons why *Heck v. Humphrey*, 512 U.S. 477 (1994), should not be applied to dependency or family law proceedings. The County dealt with those reasons in its petition and will not repeat those arguments here.

Deanna disingenuously argues that the family court order awarding custody to her ex-spouse, Cary, was "never admitted at trial." Opp. br. at 40. The jury may have never seen it, but it *was* part of the trial court record because *Deanna introduced it*. In a pretrial motion, Deanna successfully sought to bar evidence of "coaching" her children concerning sexual abuse allegations. Deanna argued that such evidence was barred by collateral estoppel because when the family court decided not to award attorneys' fees against her for making wrongful accusations of abuse against Cary, this determined whether K. was abused and did not allow redetermination of the issue. Deanna supported her motion with a copy of the family court's

operative custody order. Reply App. 12-18.[4] Petitioners did not have to seek judicial notice of this order because *Deanna already had made it part of the record*.

Deanna also argues that the juvenile court detention order removing her children was nonappealable. Opp. br. at 40. While that is true, the family court custody order (that she introduced into the record), awarding custody to Cary, *was* appealable. *Enrique M. v. Angelina V.*, 121 Cal.App.4th 1371, 1377-1378, 18 Cal.Rptr.3d 306, 310-311 (2004) (and cases cited therein). Deanna never appealed from the family court's custody determination. That failure should bar her from re-examining the issue under the analysis of *Heck*.

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[4] Deanna asserts that petitioners "rely heavily on matters outside the trial record, ..." This is blatantly false. All of the materials contained in the appendix to the petition were part of either the clerk's or reporter's transcripts on appeal. In contrast, Deanna includes in her appendix two documents that were *not* part of the record: an opposition to her attorneys' fee motion (filed several months *after* the California Court of Appeal's decision) and an unpublished California Court of Appeal opinion, which cannot be cited as precedent in California.

V. The California Court of Appeal's Opinion Finding Waiver of Absolute Immunity is Inconsistent With Federal Court Precedents.

Deanna argues that "federal pleading procedures do not apply in state courts." Opp. br. at 42. Petitioners never argued otherwise. The question is whether a governmental entity waives the defense of absolute immunity in a federal civil rights case when it raises the defense in pretrial motions but does not affirmatively plead it in its answer. Deanna can cite no case – state or federal – that has found a waiver under these circumstances (except the court in this case).

Deanna then returns to her waiver theme, stating without explanation that petitioners waived the issue on appeal by "failure to designate an adequate record." Opp. br. at 42, citing App. 30-32. The citation to App. 30-32 is a portion of the California Court of Appeal's opinion, which says nothing about the failure to designate. In fact, it says the opposite, noting that petitioners' motion to amend its answer was part of the record on appeal. App. 31 n. 7. Once again, there is no waiver of the issue.

CONCLUSION

All of the issues raised in the petition are properly before this Court. The brief in opposition fails to minimize the significance of those issues. This Court should grant certiorari or, alternatively, grant, vacate and remand for reconsideration in light of *Connick* and cases such as *Copper* and *Quezada*.

Respectfully submitted,

BUCHALTER NEMER, PC

ROBERT M. DATO
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EFRAT M. COGAN

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Helen Dwojak, and Marcie Vreeken

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK, PLAINTIFF, VS. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK, DEFENDANTS.	)	NO. 01CC02379

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 27, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
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BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1064] **RAY WILLIAM LONDON,**

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. SUTHERLAND:

* * *

[1083] Q ALL RIGHT. NOW I WOULD LIKE TO TURN TO WHAT YOU ARE BASING THE OPINIONS YOU ARE GOING TO GIVE ON.

OKAY?

A UH-HUH.

Q FIRST I WANT TO ASK YOU, HOW MUCH MATERIAL DID YOU READ IN THIS CASE? CAN YOU GIVE US AN IDEA OF THE VOLUME?

A IT STANDS ABOUT EIGHT FEET.

Q DID YOU MAKE A LIST OF THE MATERIALS THAT YOU [1084] REVIEWED IN FORMULATING YOUR OPINIONS?

A YES, I DID.

MS. SUTHERLAND: YOUR HONOR, MAY I APPROACH?

THE COURT: YOU MAY.

MS. SUTHERLAND: I'M SHOWING THE WITNESS WHAT WAS MARKED AS EXHIBIT 1 TO DR. LONDON'S DEPOSITION TRANSCRIPT.

BY MS. SUTHERLAND:

Q DO YOU RECOGNIZE THIS DOCUMENT?

A YES, I DO.

Q WHAT IS THIS DOCUMENT?

A THIS IS THE LIST OF THE DEPOSITIONS AND THE RECORDS THAT I REVIEWED, AS WELL AS DATES AND FOCUS OF LETTERS THAT I RECEIVED FROM YOU. . . .

* * *

Q I'M NOT GOING TO GO THROUGH EVERYTHING ON THE LIST, BUT I WANT TO ASK YOU A FEW CATEGORIES OF ITEMS.

DID YOU REVIEW IN THIS CASE THE ENTIRE SOCIAL SERVICES AGENCY FILE?

[1085] A YES.

Q ABOUT HOW THICK WAS THAT FILE?

A I DON'T KNOW. SIX, SEVEN INCHES, EIGHT INCHES.

Q DID YOU ALSO REVIEW THE JUVENILE COURT FILE?

A YES.

Q DID YOU REVIEW PLAINTIFF'S TREATMENT RECORDS FROM DOCTORS WARNER AND WALDROP AND FROM MS. JANICE BEACON?

A YES.

Q DID YOU REVIEW KENDALL'S SCHOOL RECORDS DATING BACK TO WHEN SHE STARTED?

A YES.

Q ABOUT HOW VOLUMINOUS WERE THOSE RECORDS?

A I DON'T KNOW. SEVEN OR EIGHT INCHES, AS I REMEMBER. THERE WERE A LOT.

Q DID YOU ALSO REVIEW DR. MITCHELL'S RECORDS REGARDING HER COUNSELING OF THE GIRLS OVER THE YEARS?

A YES.

Q ABOUT HOW THICK WERE THOSE RECORDS?

A ABOUT SIX, SEVEN INCHES.

Q AND I'M GOING TO GO THROUGH A LIST OF SOME NAMES, AND I'M GOING TO ASK YOU WHETHER OR NOT YOU READ THESE PERSONS' DEPOSITION TRANSCRIPTS IN FORMULATING YOUR OPINIONS.

MRS. FOGARTY-HARDWICK?

A YES.

[1086] Q DID YOU READ ELAINE WILKINS?

A YES.

Q HELEN DWOJAK?

A YES.

Q JOYCE REILY?

A YES.

Q LARRY LEAMAN?

A YES.

Q MARCIE VREEKEN?

A YES.

Q DR. MARJORIE MITCHELL?

A YES.

Q PATRICIA DUMAS?

A YES.

Q RACHEAL DAVIS?

A YES.

Q SUSAN HOLL?

A YES.

Q DR. BARBARA WARNER?

A YES.

Q CARY HARDWICK?

A YES, I THINK I DID.

Q AND JANICE BEACON?

A YES.

Q DID YOU ALSO READ DR. MITCHELL'S – WELL, EXCERPTS FROM DR. MITCHELL'S TESTIMONY FROM THE FAMILY [1087] COURT TRIAL?

A YES.

Q DID YOU ALSO READ PORTIONS OF MS. DAVIS'S TESTIMONY FROM THE JUVENILE COURT TRIAL?

A YES.

Q DID YOU ALSO REVIEW VARIOUS RESPONSES TO INTERROGATORIES OR WRITTEN QUESTIONS BETWEEN THE PARTIES TO THIS CASE AND RESPONSES TO REQUESTS FOR ADMISSIONS?

A YES.

Q IN WHAT MONTH DID YOU BEGIN RECEIVING ALL OF THESE MATERIALS FROM MY OFFICE FOR REVIEW?

A APRIL OF 2006.

Q AND SO YOU HAD SEVERAL MONTHS THEN TO REVIEW THEM BEFORE GIVING YOUR OPINION IN THIS CASE?

A YES.

Q DID YOU ALSO EVALUATE THE PLAINTIFF IN A FACE-TO-FACE INTERVIEW?

A YES.

Q ABOUT HOW MUCH TIME DID YOU SPEND IN THAT PROCESS?

A ABOUT FOUR, FOUR AND A HALF HOURS.

Q WHEN DID YOU CONDUCT THAT INTERVIEW?

A THE LATTER PART OF 2006.

Q WHAT DID THE INTERVIEW ENTAIL?

A IT ENTAILED A BRIEF PSYCHOSOCIAL HISTORY AND A REVIEW OF THE SYMPTOMS THAT SHE HAD EXPERIENCED AND THE [1088] BASIC BACKGROUND OF WHAT SHE AND THE CHILDREN HAVE GONE THROUGH. . . .

* * *

(NOON RECESS.)

* *

[1116] Q AFTER HAVING REVIEWED ALL THESE MATERIALS IN THIS CASE, DID YOU

ALSO FORM AN OPINION AS TO THE SOCIAL SERVICES AGENCY'S HANDLING OF THIS CASE?

A YES.

Q WHAT ARE YOUR OPINIONS – YOUR OVERALL OPINIONS OF THEIR HANDLING OF THIS CASE?

MR. STEBENS: OBJECTION; FOUNDATION, LACK OF EXPERTISE.

THE COURT: OVERRULED.

THE WITNESS: I THINK THAT THEY HAD POLICIES AND PROCEDURES THAT DID NOT REQUIRE APPROPRIATE INTERVENTION.

I THINK THAT THEY HAVE – THEY HAD A SYSTEM WHERE, WHEN THERE IS A DIFFERENCE OF OPINION BETWEEN THE CLIENT OR THE CHILDREN OR THE SOCIAL WORKER, THAT THE SOCIAL WORKER TAKES PRECEDENCE.

I THINK THEY HAVE A POLICY AND PRACTICES OF DISBELIEVING THE CLIENT AND THE CHILDREN.

I THINK THAT THEY PUT THE INTERESTS OF PROTECTING THE SOCIAL WORKER OVER THE BEST INTERESTS OF THE CHILD.

I THINK THAT THEY ACCUSED THE MOTHER OF THINGS AS A MATTER OF COURSE, LIKE

JUST BOILERPLATE ACCUSATIONS WITHOUT JUSTIFICATION OR WARRANT.

[1117] I THINK THEY HAVE A PROCEDURE AND A POLICY THAT SAYS THAT THEY DON'T EVEN HAVE TO FOLLOW SOME OF THEIR OWN POLICIES AND PROCEDURES.

I THINK, CONTRARY TO FEDERAL GUIDELINES, THEY EXPERIMENTED WITH THE PARENT-CHILD RELATIONSHIP BY REMOVING THE CHILD WITH KNOWN HARM, BECAUSE EVERY SOCIAL WORKER KNOWS THAT THERE IS HARM WHEN YOU MOVE CHILDREN. YOU HAVE TO BALANCE THAT OUT.

AND THE ONLY THING I FOUND IN THE CASE WAS THAT THE SOCIAL WORKERS WANTED TO ASSESS WHAT KIND OF INFLUENCE THE MOTHER WAS HAVING ON THE CHILDREN; AND, YOU KNOW, THAT'S INAPPROPRIATE AND IT'S UNPROFESSIONAL AND IT'S NOT A VALID JUSTIFICATION. IT'S SOME ISSUES OF THE POWER OF THE SOCIAL WORKER.

AND THEY IGNORED OTHER PROFESSIONALS' JUDGMENTS ABOUT THE FACT THAT THERE WASN'T ANY HARM OR THEY DIDN'T HAVE A SYMBIOTIC RELATIONSHIP. SOCIAL WORKER AFTER SOCIAL WORKER AFTER SOCIAL WORKER, PSYCHOLOGIST AFTER PSYCHOLOGIST AFTER PSYCHOLOGIST SAID THIS IS FINE, EVERYTHING IS OKAY, YOU KNOW. AND THEN ALL OF A SUDDEN, A NEW SOCIAL

WORKER IS ASSIGNED TO THE CASE AND ALL OF THAT EVIDENCE IS OUT AND IT'S A WHOLE NEW – IT'S A WHOLE NEW BALL GAME.

BY MS. SUTHERLAND:

Q WERE THE CHILDREN PROTECTED IN THIS PROCESS?

MR. STEBENS: OBJECTION; INCOMPLETE HYPOTHETICAL.

[1118] THE COURT: SUSTAINED.

BY MS. SUTHERLAND:

Q BEFORE THE AGENCY BECAME INVOLVED IN THE LIVES OF KENDALL HARDWICK, PRESLIE HARDWICK, AND DEANNA FOGARTY-HARDWICK, DID THE MOTHER AND CHILDREN ENJOY A FUNCTIONAL MATERNAL-CHILD RELATIONSHIP?

A YES.

Q ARE YOU FAMILIAR WITH THE PHRASE "AGENCY CASE"?

A YES.

Q WHAT DOES THAT MEAN?

A IT'S A CASE WHERE EVERYONE IN THE SOCIAL SERVICES AGENCY KNOWS IT AND EVERYBODY HAS OPINIONS ABOUT IT. IT JUST KIND OF BECOMES A CELEBRITY CASE, AND USUALLY NOT IN A POSITIVE WAY. AND SO

THEN THERE IS DIVISIONS WITHIN THE RANKS ABOUT IF THIS IS GOOD OR IF THIS IS BAD, AND IT'S SOMEWHAT DIVISIVE.

I THINK THIS IS REALLY EVIDENT IN THE FACT THAT THERE WERE ACCUSATIONS MADE AGAINST THE MOTHER BY SOCIAL WORKERS SAYING SHE WAS MENTALLY ILL AND HAD A PERSONALITY DISORDER WHEN THERE WASN'T ANY EVIDENCE TO SUPPORT THAT.

* * *

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DEANNA FOGARTY-HARDWICK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

DEANNA FOGARTY-HARDWICK & ROES 1-5, Plaintiffs, v. COUNTY OF ORANGE, et al., Defendants.	) Case No. 01CC02379) (Case Assigned to) Hon. Ronald L. Bauer,) Dept. CX103))) Date Action Filed: 2/15/01) Trial Date: 8/7/06)) PLAINTIFFS' MOTION IN) LIMINE TO EXCLUDE) INTRODUCTION INTO) EVIDENCE OF COACHING) OR UNDULY INFLUENCING) THE CHILDREN

SET ONE, NO. 2 OF 6
DATE: 12/29/2006
TIME: 9:00 a.m.
DEPT: CX103

GRANTED

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff hereby moves this Court for an order to exclude any and all evidence which mentions, indicates, or otherwise suggests that the mother, Deanna Fogarty-Harwick [sic], plaintiff in the present action, coached or unduly influenced her minor children to make accusations of abuse.

This motion is made under the provisions of Evidence Code sections 350 and 352, and is based on the supporting Points and Authorities below, the pleadings and papers on file in this action, and upon such argument and evidence that may be presented prior to or at the hearing of this motion.

1.
INTRODUCTION

The present case arises from the wrongful conduct of defendants in their handling of juvenile court cases which resulted in the removal of plaintiff's minor children from her custody. Her minor children,

Kendall Hardwick and Preslie Hardwick, were the subject of proceedings filed in the juvenile division of the Orange County Superior Court, cases numbers DP002001 and DP002002.

Defendants will attempt to introduce evidence to infer that the mother coached or unduly influenced her children so that they would make accusations of abuse. These allegations are collateral to the issues presented in the present case, and their probative value, if any, is substantially outweighed by the prejudice that plaintiff suffer should the allegations be allowed t be presented before the jury.

During the divorce proceedings, the father claimed that the mother "programed" (sic) one of the children to make the accusation of abuse. (Declaration of Rogelio Sampaga Jr., pg. 2, para. 3, Exhibit A (page 8 of Order After Hearing Order to Show Cause, Orange County Superior Court, December 31, 2001).) The family court found that the mother believed that the accusation of child abuse was true, and then took the child to a licensed mental health professional for suspected sexual abuse, expecting that the provider would make the report. (*Id.*)

* * *

3.

A COURT HAS ALREADY DENIED AN AWARD EASED ON THE ALLEGATION OF COACHING OR UNDUE INFLUENCE

Family Code section 3027.1 allows an award of monetary sanctions and attorneys fees:

> "If a court determines, based on the investigation described in Section 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions . . . and reasonable attorney's fees. . . ." Fam. Code §3027.1(a).

The allegation of coaching or undue influence has already been made in a prior court proceeding, and the court declined to act on the matter. In 2001, at approximately the same time that the juvenile cases were pending, the children's mother and father, Cary W. Hardwick, were involved in divorce proceedings. The father made a claim for sanctions and attorneys fees based upon Family Code section 3027.1, essentially claiming that Deanna had coached or unduly influenced one of the children into making a false accusation of child abuse. The court made an investigation pursuant to statute, considered the claim, and then denied it. (Declaration of Rogelio Sampaga Jr., pg. 2, para. 3, Exhibit A (see page 8 of Order After Hearing Order to Show Cause, Orange County Superior Court, December 31, 2001)) It would be prejudicial to allow evidence on this collateral matter to come before the jury, particularly where a prior court has already made a decision on this point.

3. [sic]

COLLATERAL ESTOPPEL OPERATES TO PRECLUDE EVIDENCE OF COACHING

* * *

The underlying facts in prior proceeding (namely, the divorce proceeding between Deanna and Cary Hardwick) was a determination of whether Deanna coached or unduly influenced the children into making false accusations of abuse and the [sic] Deanna knew that such accusations were false when they were made. That court determined that there was not sufficient evidence to support that assertion, and that on the contrary, Deanna took the children to a professional for evaluation. (Declaration of Rogelio Sampaga Jr., pg. 2, para. 3, Exhibit A (page 8 of Order After Hearing Order to Show Cause, Orange County Superior Court, December 31, 2001).)

This is exactly the same allegation, with the exact same underlying facts, that defendants will attempt to introduce in the present proceeding. Both Cary Hardwick and the defendants in the present action share the role of contesting the suitability of Deanna's place as custodial mother of the children. For those reasons, it would be within the Court's discretion to find that there was a relationship "sufficiently close" and that in the interests of justice, any evidence of coaching or undue influence should be excluded from evidence.

* * *

6.

CONCLUSION

Based on the foregoing reasons, plaintiff respectfully requests an order to exclude any and all evidence which mentions, indicates, or otherwise suggests that the mother coached or unduly influenced the children to make accusations of abuse.

Dated: December 18, 2006

THE LAW OFFICES OF
SHAWN A. MCMILLAN, APC

/s/ Rogelio Sampaga
Rogelio Sampaga Jr., Esq.
Attorneys for Plaintiff,
DEANNA FOGARTY-HARDWICK

---

* * *

DECLARATION OF ROGELIO SAMPAGA JR.

I. ROGELIO SAMPAGA JR., hereby declare and state:

1. I am an attorney at law duly admitted to practice before all of the courts of the State of California and I am employed with The Law Offices of Shawn A. McMillan, A.P.C., one of the attorneys of record herein for DEANNA FOGARTY-HARDWICK, plaintiff in the present action.

2. The following facts to which I hereby declare are of my own personal knowledge and if called upon

to testify to the truth and veracity thereof, I would and could competently do so.

3. Attached as Exhibit "A" is a true and correct copy of the findings and order of Walter D. Posey, Commissioner of the Superior Court, Superior Court of California, County of Orange, entitled "Order After Hearing Order to Show Cause:" in case number 95 D-00 48 98, In re marriage of: Deanna Hardwick and Cary Hardwick, filed on December 31, 2001.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 18 day of December, 2006, in San Diego, California.

/s/ Rogelio Sampaga
Rogelio Sampaga Jr., Declarant

EXHIBIT
A

[Previously Reproduced At App. To Cert. Petition 72-91]